APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1016

WAYNE DARNELL BUMPER, PETITIONER

vs.

NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED SEPTEMBER 18, 1967
CERTIORARI GRANTED JANUARY 15, 1968

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1016

WAYNE DARNELL BUMPER, PETITIONER

vs.

NORTH CAROLINA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

INDEX

[fol. 1]

IN THE SUPREME COURT OF NORTH CAROLINA,
FIFTEENTH DISTRICT

Spring Term, 1967

No. 826

From Alamance

STATE OF NORTH CAROLINA

v.

WAYNE DARNELL BUMPER

Dockets Nos. 109, 110, 111

Before HOBGOOD, J., October 24, 1966, Criminal Session, Alamance Superior Court. DEFENDANT APPEALED.

* * * *

[fol. 2]

IN THE SUPERIOR COURT, ALAMANCE COUNTY

CRIMINAL SESSION

ORGANIZATION OF COURT—August 15, 1966.

Be it known that the Superior Court was begun and held on the 15th day of August, 1966, for the trial of Criminal cases only, with the Honorable Hamilton H. Hobgood, Judge Presiding, and the Honorable Thomas D. Cooper, Jr., Solicitor, and the Honorable Spencer B. Ennis, Assistant Solicitor for the State of North Carolina, where the following proceedings were had, to wit:

The following are Grand Jurors serving term ending January, 1967: H. G. Alexander and eight others (naming them). The following are Grand Jurors serving term ending August, 1967: Ernest S. Sutton and eight others (naming them).

NORTH CAROLINA—ALAMANCE COUNTY

This is to certify that the foregoing is a true copy of the original on file in this office.

(SEAL)

This 28th March, 1967.
LOLA RAY MITCHELL, Deputy C.S.C.
M.D. 34—243.

[fol. 3] INDICTMENT FOR RAPE

The Jurors for the State upon their oath present, That Wayne Darnell Bumpers, late of the County of Alamance, on the 31st day of July in the year of our Lord one thousand nine hundred and sixty-six, with force and arms, at and in the County aforesaid, did unlawfully, willfully and feloniously ravish and carnally know Loretta Nelson, a female, by force and against her will, against the form of the statute in such case made and provided and against the peace and dignity of the State.

/s/ ENNIS, Assistant Solicitor.

No. 142

STATE v. WAYNE DARNELL BUMPERS

INDICTMENT—RAPE

----------,Pros.

WITNESSES:

S. D. George
X Loretta Nelson
X Monty Jones
X John Stockard

Those marked X sworn by the undersigned Foreman, and examined before the Grand Jury, and this bill found:

X A True Bill.

CAROLYN L. CORRELL
Foreman Grand Jury

NORTH CAROLINA—ALAMANCE COUNTY

This is to certify that the foregoing is a true copy of the original on file in this office.
This 28th March, 1967.
LOLA RAY MITCHELL, Deputy C.S.C. (SEAL)

INDICTMENT—ASSAULT WITH INTENT TO KILL

The Jurors for the State, upon their oath, present, that Wayne Darnell Bumpers late of the County of Alamance on the 31st day of July, 1966, at and in the County aforesaid, did, unlawfully, willfully and feloniously assault Monty Jones with a certain deadly weapon, to wit: a .22 [fol. 4] caliber rifle with the felonious intent to kill and murder the said Monty Jones inflicting serious injuries, not resulting in death, upon the said Monty Jones, to wit: serious injuries from shot wound in the chest, against the form of the Statute in such case made and provided, and against the peace and dignity of the State.

/s/ ENNIS
Asst. Solicitor.

No. 144

STATE v. WAYNE DARNELL BUMPERS

INDICTMENT—ASSAULT WITH INTENT TO KILL

WITNESSES:

X Loretta Nelson
S. D. George
X John Stockard

Those marked thus X and sworn by the undersigned foreman and examined before the Grand Jury and this Bill found: X a True Bill.

CAROLYN L. CORRELL
Foreman of the Grand Jury.

NORTH CAROLINA—ALAMANCE COUNTY

This is to certify that the foregoing is a true copy of the original on file in this office.
This 28th March, 1967.
LOLA RAY MITCHELL, Deputy C.S.C. (SEAL)

INDICTMENT—ASSAULT WITH INTENT TO KILL

The Jurors for the State, upon their oath, present, That Wayne Darnell Bumpers late of the County of Alamance on the 31st day of July, 1966, at and in the County aforesaid, did unlawfully, willfully and feloniously assault Loretta Nelson with a certain deadly weapon, to wit: a .22 caliber rifle with the felonious intent to kill and murder the said Loretta Nelson inflicting serious injuries, not resulting in death, upon the said Loretta Nelson, to wit: serious injuries from gun shot wound in chest, body [fol. 5] and back against the form of the statute in such case made and provided, and against the peace and dignity of the State.

/s/ ENNIS
Asst. Solicitor.

No. 143

STATE v. WAYNE DARNELL BUMPERS

INDICTMENT—ASSAULT WITH INTENT TO KILL

WITNESSES:

X Monty Jones
S. D. George
X John Stockard

Those marked thus X and sworn by the undersigned foreman and examined before the Grand Jury and this Bill found X a True Bill.

CAROLYN L. CORRELL
Foreman of the Grand Jury.

NORTH CAROLINA—ALAMANCE COUNTY

This is to certify that the foregoing is a true copy of the original on file in this office.
This 28th March, 1967.
LOLA RAY MITCHELL, Deputy C.S.C. (SEAL)

ORGANIZATION OF COURT—October 24, 1966

CRIMINAL TERM

MONDAY, OCTOBER 24, 1966:

Pursuant to an order of recess, court reconvened at 10:00 A.M., with the Honorable Hamilton H. Hobgood, Judge Presiding, and the Honorable Thomas D. Cooper, Jr., Solicitor, and the Honorable Spencer B. Ennis, Assistant Solicitor for the State, where the following proceedings were had, to wit:

All 30 of the regular jurors drawn for this session of court were examined; five were accepted and 25 were rejected. The five accepted are as follows: William G. Jones, Ken R. Marley, Hubert L. Halford, Howard McClain, and [fol. 6] Paul K. Curtis.

The Court ordered all names of special venire be placed in a box and selection of the jury from the special venire was resumed in the same manner as shown in the minutes above, and Jeffreys Bryan Allen, 5 years old, resumed the drawing of the names from the special venire. Ten were rejected and seven were accepted.

JURY: The following twelve (12) jurors were accepted: William G. Jones and eleven (11) others (naming them).

The Court finds that the defendant used 13 peremptory challenges and the State used two. Due to the length of the trial of this case, the Court in its discretion ordered two alternate jurors to be selected, sworn and impaneled. Six jurors were drawn from the box, four were rejected and two were accepted. Linberg Jacobs was accepted for the first alternate, and William E. Overman, Jr. was accepted as the second alternate.

The jury, having been sworn, were impaneled in cases # 109, Rape; #110, Assault with deadly weapon with intent to kill inflicting serious bodily injury not resulting in death; and # 111, assault with deadly weapon with intent to kill inflicting serious bodily injury not resulting in death.

NORTH CAROLINA—ALAMANCE COUNTY

This is to certify that the foregoing is a true copy of the original on file in this office.
This 28th March, 1967.
LOLA RAY MITCHELL, Deputy C.S.C. (SEAL)

MD. 34—338.

* * * *

[fol. 15]

Motion for Return of Seized Property and Suppression of Evidence

Wayne Darnell Bumper, the defendant in the above-entitled action, hereby moves this Court to direct that certain property of which he is the owner, namely, one pair of overall pants, one shirt, and one pair of tennis shoes, certain property of which his grandmother, Mrs. Heddy Leath, is the owner, namely, one .22-caliber Remington rifle, and which on the afternoon of August 2, 1966, at his grandmother's house in Faucette Township, Alamance County, North Carolina, was unlawfully seized and taken from his grandmother, Mrs. Heddy Leath, and from her premises by four deputies of the Sheriff of Alamance County, whose true names are unknown to the petitioner, be returned to him and to Mrs. Heddy Leath, respectively, and that it be suppressed as evidence against him in any criminal proceeding.

The petitioner further states that the property was seized against his will and the will of Mrs. Heddy Leath, and without a search warrant, as more fully shown by the affidavits of Mrs. Heddy Leath and Ronald Vaughn attached hereto as enclosures 1 and 2.

Smith, Moore, Smith, Schell & Hunter
By: /s/ Norman B. Smith
Attorneys for Defendant
Petitioner.

Affidavit of Mrs. Hattie Leath to Motion

MRS. HATTIE LEATH, being first duly sworn, deposes and says:

[fol. 16] 1. Her name is Hattie Leath. She is a Negro, a widow, and is 66 years old.

2. She lives in Faucette Township of rural Alamance County, at the end of a dirt road, approximately one mile in length, which turns off the Mount Vernon Church Road.

3. The defendant in the above-entitled action is her grandson. Before taken into custody, he lived with her. Other members of her household are her son Junius Leath and several grandchildren, the oldest of whom are of high school age and the youngest of whom are of pre-school age.

4. On Tuesday, August 2, 1966, at about 2:00 P.M., four white men drove up to her house in two cars. She knew these men to be officers of the Alamance County Sheriff's Department, although they were not in uniform. Her son Junius was not in or near the house at the time the deputies arrived, although several of her grandchildren were there.

5. One of the deputies came up on the porch of her house and walked up to the front screened door. She was standing immediately inside the door. The deputy said he had a notice or a warrant or something like that, for searching her house. He did not appear to have any paper in his hand, and he did not read anything to her. After hearing this, she did not stop to think about whether the officers had a right to search her house. She simply answered the officer right away by saying, "Go ahead," as she opened the door and stepped out onto the porch. The officers began at once to search the house.

/s/ MRS. HATTIE LEATH Affiant.

(Sworn to September 28, 1966)

[fol. 17]

AFFIDAVIT OF RONALD VAUGHN TO MOTION

RONALD VAUGHN, being first duly sworn, deposes and says:

1. His name is Ronald Vaughn. He is 14 years old.

2. He lives with his grandmother, Mrs. Heddy Leath, at the end of a dirt road which turns off the Mount Vernon Church Road in Alamance County.

3. On Tuesday, August 2, 1966, about 2 P.M., four white officers from the Sheriff's Department of Alamance County came to search Mrs. Leath's house.

4. Some time after they came inside the house and commenced their search, one of the deputies approached him and asked if they could have the overalls and tennis shoes which he was wearing. He said, "All right. Take them." He then took off the overalls and tennis shoes and gave them to the officer.

/s/ RONNIE VAUGHN Affiant.

(Sworn to September 28, 1966)

ORDER COMMITTING DEFENDANT TO CENTRAL PRISON—
October 26, 1966

It appearing to the Court that the defendant Wayne Darnell Bumpers has been convicted of the capital crime of Rape and two charges of felonious assault and has this day been sentenced to ten years in State Prison to begin at the expiration of the sentence this day imposed in Case 110, and in Case 109 to imprisonment for and during the term of his natural life in State's Prison to begin at the expiration of the sentence this day imposed in 111;

And it further appearing to the Court that the defendant has given notice of appeal to the Supreme Court of North Carolina from the sentences hereinabove imposed; [fol. 18] and it further appearing to the Court that the defendant should be transferred to State's Prison, Raleigh, North Carolina, for his own safekeeping, in that threats have been made against his life;

IT IS NOW, THEREFORE, ORDERED that the defendant Wayne Darnell Bumpers be transferred by the Sheriff of Alamance County to the Warden, Central Prison, Raleigh, North Carolina, and that the defendant be

confined to said Central Prison, without bond, until a disposition is made of his appeal by the North Carolina Supreme Court or until said appeal be withdrawn.

This the 26th day of October, 1966.

/s/ HAMILTON H. HOBGOOD
Judge Presiding.

IN THE SUPERIOR COURT, ALAMANCE COUNTY
CRIMINAL SESSION

MINUTE ENTRIES RELATING TO VERDICT, JUDGMENT AND APPEAL—October 26, 1966.

Pursuant to an order of recess, Court reconvened at 9:30 A.M. Wednesday, October 26, 1966, where the following proceedings were had, to wit:

No. 110. STATE v. WAYNE DARNELL BUMPERS.

Assault with deadly (weapon) with intent to kill inflicting serious bodily injury not resulting in death. After hearing all of the evidence and argument of counsel and the charge of the Court, the jurors say for their VERDICT: Guilty as charged in the Bill of Indictment. JUDGMENT OF THE COURT is that the defendant be imprisoned in State Prison for a term of 10 years to be assigned to do labor as provided by law.

No. 111. STATE v. WAYNE DARNELL BUMPERS

Assault with deadly weapon with intent to kill inflicting [fol. 19] serious bodily injury not resulting in death. After hearing all of the evidence, the argument of the counsel and the charge of the Court, the jury say for their VERDICT: Guilty as charged in the Bill of Indictment. JUDGMENT OF THE COURT is that he be imprisoned in State Prison for a term of 10 years to be assigned to do labor as provided by law. This sentence is to begin at the expiration of sentence imposed in No. 110.

Rape. The defendant has heretofore been arraigned and his privately employed counsel, Norman B. Smith, enters a plea of not guilty. After the defendant's attorney and the Solicitor and Assistant Solicitor made arguments to the jury, the Court then charged the jury and finished the charge at 1:10 P.M. The twelve members of the jury who were selected to try the case retired to the jury room to deliberate upon a verdict after the two members of the jury who were selected as alternates were excused at 2:30 P.M. The jury filed into the courtroom at 4:30 P.M. and announced that they had reached a verdict. Whereupon the following proceedings were had, to wit: THE COURT SAID TO THE JURY: "Gentlemen of the jury, answer to your name as they are called." The Court called the roll of the jury and all 12 members of the jury answered and the Court made the following inquiry with answer shown below:

COURT: Have you all agreed on a verdict?

THE JURY says: We have.

COURT: Who shall speak for you?

THE JURY says: Wallace P. May, Jr., our Foreman.

COURT: Wayne Darnell Bumpers, stand up, hold up your right hand. Same being done. Gentlemen of the jury, look upon the prisoner. What say you? Is he guilty of the felony of Rape whereof he stands indicted, or not guilty?

WALLACE P. MAY, JR., Foreman of the Jury (speaking for the Jury): Guilty of rape as charged in the Bill [fol. 20] of Indictment and recommend that he be punished by imprisonment for life in State Prison.

COURT: Gentlemen of the jury, if this is your verdict all twelve members hold up your right hand.

COURT: Hearken to your verdict as the Court records it you say that Wayne Darnell Bumpers is guilty of rape whereof he stands charged with the recommendation for mercy so say you all. Judgment of the Court is that the defendant Wayne Darnell Bumpers be imprisoned in State Prison for the remainder of his natural life to be assigned to work as by law provided. This sentence to

begin at the expiration of the sentence in No. 111 this day imposed. The defendant through his privately employed counsel, Norman B. Smith, gives notice of appeal to the State Supreme Court in cases Nos. 109, 110, and 111. Further notice waived. The defendant is given 90 days to serve case on appeal and the State is allowed 30 days to file exceptions or counter-case on appeal.

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* * * *

[fol. 25]

STATEMENT OF CASE ON APPEAL

This was a matter that came on for trial and was tried at the October 1966 Criminal Session of Alamance County Superior Court, before His Honor Hamilton H. Hobgood, Judge Presiding, and a jury. The State was represented by Honorable Thomas D. Cooper, Jr., Solictor, and Honorable ———— Ennis, Assistant Solicitor; the defendant by Norman B. Smith, Esq., of the firm of Smith, Moore, Smith, Schell & Hunter. The defendant was tried upon three bills of indictment, consolidated for trial, upon motion of the Solicitor, to wit, Bill of Indictment in Case Number 109, "Rape"; Bill of Indictment in Case Number 110, "Assault with a deadly weapon upon one Monty Jones, with intent to kill, inflicting serious injury, not resulting in death"; and Bill of Indictment in Case Number 111, "Assault with a deadly weapon upon one Loretta Nelson, with intent to kill inflicting serious injury not resulting in death."

The defendant entered a plea of "Not Guilty" to each of the charges.

The jury found the defendant guilty as charged in Cases 110 and 111, and guilty as charged in Case 109, with a recommendation of life imprisonment. Thereupon the defendant gave notice of appeal to the State Supreme Court in each case.

THE COURT: Let the record show the Clerk places at this time the names of the Jurors upon scrolls of paper and puts them in a box to be drawn as provided by law [fol. 26] by a child under ten years of age.

THE COURT: What is the name of the child?
THE CLERK: Jeffery Bryan Allen.
THE COURT: What is the age of the child?
THE CLERK: Five years of age.

Thereupon the following took place upon the *VOIRE DIRE* directed to each prospective juror by name, as indicated, to select a jury of twelve and two alternate jurors, to wit:

MRS. ELBERT H. ANDERMAN:
Passed by the State
Excused by the defendant

JIMMY ROBERTSON
Passed by State
Excused by defendant

WILLIAM G. JONES
Accepted by the State and Defendant

SARA ISABEL ANDERSON—EXAMINED BY THE STATE:

I don't believe in capital. In the event the Court instructed me that the verdict of guilty would require the Court to sentence this man to die in the gas chamber, I would not even consider that.

MR. COOPER: Challenge for cause.
THE COURT: You may be excused.
Exception by Defendant. EXCEPTION # 1.

KEN R. MARLEY
Accepted by the State and the Defendant.

J. WESLEY ALEXANDER—Examined by the State:

I wouldn't say I have any religious scruples against the imposition of capital punishment. I don't think that I

could vote for the death penalty. If the Court instructed me that was one of the verdict according to the law of this State and according to the Oath that I have taken as a juror, that I would have a duty to consider, I don't [fol. 27] think I could obey the Court's instructions and the law and consider that a possible verdict. I don't think I could vote for capital punishment under any circumstances, regardless of what the Court instructs.

MR. COOPER: Challenged for Cause.

THE COURT: What is your name, sir?

JUROR: J. Wesley Alexander.

THE COURT: You may be excused.

MR. SMITH: The defendant would like to oppose the challenge for cause on the grounds of opposition to the death penalty, in that the sustaining of such challenges deprives the defendant of the ability to select from a true cross-section of the community.

THE COURT: Motion denied. Exception by the defendant. EXCEPTION # 2.

GEORGE MOORE

Passed by the State

Excused by Court—Cause challenge Defendant

RUFUS SHOFFNER—Examination by State:

I have conscientious or religious scruples against the imposition of capital punishment: I am kind of a churchman myself. I attend church at Springhill, Route 1. Denomination, A.M.E. Methodist. No, sir, I do not believe in capital punishment. I don't; I will just be frank with you. I don't. I don't think I would consider a verdict of that sort under any circumstances.

MR. COOPER: Challenge for cause.

THE COURT: All right, allowed. You may be excused.

Defendant Excepts. EXCEPTION # 3.

HUBERT L. HALFORD

Accepted by the State and the Defendant.

MRS. HASSIE R. DANIELS

Passed by the State. Excused by Defendant.

[fol. 28] JOHN Z. LUCAS
Passed by the State. Excused by Defendant.

HOWARD McCLAIN
PASSED by both the State and Defendant.

JESSIE ALBRIGHT
Passed by State. Excused by Defendant.

NELLIE D. STOUT—Examined by the State:

I do not believe in capital punishment. I would not under any circumstances consider such a verdict.

MR. ENNIS: Challenge for cause.

THE COURT: You may be excused.

Defendant Excepts. EXCEPTION # 4

WILLIE WAVERLY GWYNN—Examination by State:

I do not believe in capital punishment. No, sir. Regardless of what the evidence revealed, I would not consider that verdict, no more than I know about. No, I have to say no, sir.

MR. ENNIS: Challenge for cause.

THE COURT: You may be excused.

MR. SMITH: I would like to ask him a question.

THE COURT: All right.

Examination by counsel for Defendant:

The last think I said was as far as I know right now I couldn't go along with the death penalty. If I were to sit on the jury and the facts were proved such that the defendant committed an atrocious act, I would rather not pass the death penalty. If the Judge charges me and told me I must consider the death penalty, I would, if I had to. I would do what the Judge told me. Even if the Judge told me I had to go in the jury room and consider whether or not to bring in a verdict involving a capital crime, well, I think I would have to do what he said. Even if I didn't want to.

THE COURT: Do you believe in capital punishment?

JUROR: No, sir.

[fol. 29] THE COURT: The Court excuses the juror.
MR. SMITH: Exception.

EXCEPTION # 5.

THE COURT: During the noon hour, at 1:15, Mr. Richard Qualls on the special venire was examined by a doctor and I have a medical certificate from Dr. Blair indicating he should be excused.

THE COURT: The defense counsel, Mr. Norman Smith, objects to the Court in any instance during the trial Court's excusing any juror who states he does not believe in capital punishment. Let that show in the record.

PAUL K. CURTIS
Passed by both the State and Defendant.

W. H. TURNER
Passed by the State
Excused by the Defendant.

WILFRED B. CLARK
Passed by the State
Excused by the Defendant.

E. A. SHELTON—Examination by the State:

I do not believe in capital punishment. Even if I felt the crime to be severe enough, I would not consider capital punishment at all.

MR. ENNIS: Challenge for cause.
THE COURT: All right. You may be excused.

EXCEPTION # 6.

J. LUTHER JONES—Excused by the Court.

MRS. DENELA H. FULLER—Examined by the State:

I have conscientious or religious scruples against the imposition of capital punishment.

MR. COOPER: Challenge for cause.
THE COURT: The Court will excuse you.

EXCEPTION # 7.

DON LEE RATCLIFF
Excused by the State.

[fol. 30] VERNON E. JOHNSON
Excused by the State.

MRS. G. A. HENDRICKS
Passed by the State
Excused by the Defendant.

LENNIS WILLARD RATCLIFF — Examined by the State:

No, I do not believe in capital punishment, under any circumstances.

MR. COOPER: Challenge for cause.

THE COURT: You may be excused.

EXCEPTION # 8.

JOSEPH HOLT
Excused by the Court.

JAMES W. TRIPP
Passed by the State
Excused by the Defendant.

GARLAND HOWERTON
Passed by the State
Excused by the Defendant.

EVERETT W. MOORE—Examined by the State:

I don't believe that God gives me the right to condemn anybody to death. That is my personal belief. If the defendant was found guilty and I was to pass sentence on him, the foremost thought in my mind to render this verdict would be am I right in the eyes of God in taking this man's life. I don't believe I would consider voting for a verdict of guilty as charged which would require the Court to sentence him to death. No, I don't believe I have the right to consider that one of several verdicts.

MR. COOPER: Challenge for cause.

THE COURT: As I understand, you do not believe in capital punishment, is that right?

JUROR: No, sir. I don't think that I have that right to take another man's life.

[fol. 31] THE COURT: All right, excused by the Court.

EXCEPTION # 9.

THE COURT: Now, I believe the regular panel has been exhausted. We will now start with the special venire.

JAMES HOWELL
Passed by the State and the Defendant.

RAINEY REID HOOPER
Passed by the State and the Defendant.

LEO R. CRUTCHFIELD
Passed by the State and the Defendant.

COLLIE L. HALL
Passed by the State
Excused by the Defendant.

BILLY JOE SHOFFNER

THE COURT: Let the Court ask this question of you, as to capital punishment. When you speak of capital punishment, do you know what that is? You don't know what that means?

JUROR: No, I don't.

THE COURT: So, if you were asked whether you believe in capital punishment, you wouldn't know, because you don't know what it means.

JUROR: That is right, because I haven't been able to read and keep up with matters. I don't read the newspaper, because I can't.

THE COURT: I will excuse you, Mr. Schoffner. Go by the Clerk's office and prove your attendance.

EXCEPTION # 10.

BILLY PAGE
Passed by the State and the Defendant.

LEONARD D. HALL
Passed by the State and the Defendant.

DAVID L. SMITH—Examined by the State:

No, Sir, I don't believe in capital punishment. I would not consider a verdict that would result in capital pun-
[fol. 32] ishment under any circumstances. I don't believe in taking a man's life.

MR. ENNIS: Challenge for cause.

THE COURT: You may be excused.

EXCEPTION # 11.

MRS. EDNA FITCH—Examined by the State:

I do not believe in capital punishment.

MR. ENNIS: Challenge for cause.

THE COURT: You may be excused.

EXCEPTION # 12.

GLENN W. FISHER—Examined by the State:

I believe in capital punishment. I know what you mean by capital punishment. I consider by capital punishment is meant taking anyone's life. I believe the State has a right to take someone's life in certain circumstances. Not in a rape case. I understand this is a rape case you are trying along with two other charges. In this case, which is rape, which would be a capital crime in this State, I would not consider a verdict of guilty as charged. No, I would not.

MR. ENNIS: Challenge for cause.

COURT: Let me ask him a question. You do not believe in capital punishment in rape cases, is that what you said?

JUROR: Yes, sir.

THE COURT: All right, you are excused.

EXCEPTION # 13.

W. P. MAY, JR.

Accepted by the State and the Defendant.

DONALD H. HOLT—Examined by the State:

I do not believe in capital punishment; not under any circumstances.

MR. COOPER: Challenge for cause.

THE COURT: You may be excused.

EXCEPTION # 14.

WILLIAM D. PICKARD
Passed by the State.
Excused by the Court. Cause, Defendant.

[fol. 33] T. G. RICHARDSON
Passed by the State
Excused by the Defendant.

FLOYD STALLINGS—Examined by the State:

I don't believe in capital punishment under any circumstances.

MR. COOPER: Challenge for cause.
THE COURT: You may be excused.
EXCEPTION # 15.

JAMES LESTER BROWER—Examined by the State:

I do not believe in capital punishment under any circumstances.

MR. COOPER: Challenge for cause.
THE COURT: You may be excused.
EXCEPTION # 16.

FRANK ODELL HARRIS
Passed by the State and the Defendant.

JURY IMPANELED

MR. COOPER: Your Honor, please, I would like for the record to show at this time at the end of the selection of the regular panel, the number of peremptory challenges left to the defendant and the State.

THE COURT: All right. The peremptory challenges left to the defendant, according to my count, you have used 13; is that right?

MR. SMITH: Yes.

THE COURT: He has one left on that, plus you will have two each for each alternate, which gives five. The State, according to my count, has used two; is that correct?

MR. COOPER: Yes, sir.

THE COURT: You have four left, plus four additional, or eight.

THE COURT: Now, you will put this in the record: The Court finds that we are engaged in the trial of a capital case, wherein the defendant is on trial for the capital charge of rape, and in addition to two felonious charges of assault with intent to kill, in which a deadly [fol. 34] weapon was used, resulting in injury to the parties therein stated, not resulting in death. And the Court further finds that the trial is likely to be protracted, and therefore in its discretion, the Court orders that two alternate jurors be selected. You will proceed with the drawing of two alternate jurors.

JODIE McDANIEL—Examined by the State:

I do not believe in capital punishment under any circumstances.

MR. COOPER: Challenge for cause.

THE COURT: All right. You are excused.

EXCEPTION # 17.

BONNIE K. BURKE
Passed by the State
Excused by the Defendant.

R. N. DEFORD
Passed by the State
Excused by the Defendant.

J. W. PICKARD
Passed by the State
Excused by the Defendant.

GLENN BYRD JACOBS
Passed by the State and the Defendant.

WILLIAM E. OVERMAN, JR.
Passed by the State and the Defendant.

JURY IMPANELED

THE COURT: Members of the jury, all fourteen of you have been selected as the jury, plus two alternates, in

the trial of these three cases, one of which is the capital case of rape. It is very important that you listen carefully to what the Court is now saying to you, that is this: Throughout this trial, you will have the duty of not reading about this case, not listening to it on the radio or television, if such occurred, and you are not to hear anything stated about this case except what is stated here in the [fol. 35] courtroom in the way of sworn evidence. The Court also instructs you that upon leaving the courtroom and going home, and the Court will allow you to go home instead of placing you in custody overnight, that you will leave immediately as soon as you can do so, and you will go directly home or to your place of business or away from the courtroom and surrounding area, and when you return tommorow morning, or any day, you will come immediately to the jury room right here across from this door here (indicating) and stay there until the officer has you to come back into the courtroom. Now, we will ask you to come back not later than 9:20 in the morning; we reconvene at 9:30, and you will be in the jury room ready and available for Court when it reconvenes. Please remember these instructions, because it is absolutely imperative that you do so, because it is necessary in any case, and even more necessary in a case of a serious nature. Now, Mr. Sheriff. No one leaves the courtroom until I tell them to leave. Now, this jury will be excused until 9:20 in the morning. You may go at this time by using this door.

THE STATE'S EVIDENCE

MR. SMITH: The defendant would like to have the State's witnesses be sequestered during this trial.

THE COURT: The motion by defendant's counsel that the State's witnesses Monty Jones and Loretta Nelson be sequestered and separated during the evidence is allowed. Which will you want first, Mr. Cooper?

MR. COOPER: Loretta Nelson will be the first witness. I assume it is not necessary to sequester her.

THE COURT: Put in the record, the Sheriff will take Monty Jones out of the courtroom.

[fol. 36] MRS. LORETTA BRIGGS NELSON, being sworn, testified for the State, as follows:

I live at 704 Linwood Drive, Burlington. I am 21 years of age. No, sir, I do not know the defendant Wayne Darnell Bumpers. I have seen him prior to this date, on the night I was raped. I saw him July 31, at City Lake. It was down on the road, highway going down beside City Lake; you turn off on the right. Monty Jones was with me when I saw the defendant. It was about 7:30 at night. That day I went to church Sunday morning, and after church I went over to Monty's house, Monty Jones'. This was noontime. After that, Monty went with me down to my uncle's for a birthday dinner.

My uncle lives out near Roxboro. I spent about an hour at my uncle's house. I left my uncle's about 2:00 or 2:30 in the afternoon. Monty was with me then. Then we went back up to Monty's house. That is located on Lakeside Avenue, in Burlington. I stayed at Monty's house until about 6:30, when we left Monty's house. While we were at Monty's house, we were cutting up in the back yard and talking to his parents. I had supper at Monty's house that night. After supper, I got in my car and went out to City Lake and parked.

I have a '65 Corvair. I am not living with my husband. I am separated from him. I separated on November 19, 1965. No, sir, I have not lived with him since then. I had been going with Monty since January. I said that after supper I went out to park. How I happened to pick the place I parked is, we went riding and rode toward City Lake and I saw a road and backed up into it. After we backed into the road, Monty kissed me a couple of times and we talked and about that time Wayne Bumpers walked up. We had been there about ten or fifteen minutes before I first saw Wayne Bumpers. The first thing that occurred when he came up to the car was he tapped on the window and I rolled it down about two inches. He [fol. 37] asked me to open the door, and I said no. He

asked me to open the door again, and I said No. Then he put the rifle between the window, and I opened the door. I couldn't say what kind of rifle—just a rifle. When he put the rifle in the window, he told me to get out of the car.

After that, I got outside the car, and he said, "I want a white girl's p. . . . .," and he pointed the gun at me. I said, "No, I would rather die first." Then he pointed the gun at Monty, and he said, "Are you going to give it to me?" I said, "Yes." After that, he said, "Well, strip." So. I took my clothes off, and we walked around behind the car, and I laid on the back of the car, and he raped me. At this time the rifle was in his hand on the back of the car, pointed at the back window, towards Monty's head. At this time Monty was in the back seat. He was laying down, with his head laying part of the way down. Yes, in the back seat. When Bumpers told me to go around to the back of the car, he told Monty to get in the back seat. My position on the car at this time is that I was just laying on the back of the car. I had my clothes off.

At this particular time, the defendant said to me, "I hope you don't get blood on you, little lady." He had already hit me in the head with the gun. I don't remember when he hit me with the gun; I said something smart to him. That was before I got on the back of the car. He hit me on my forehead (indicating). Yes, sir, it bled.

When I was on the back of the car, the defendant did not take his pants off; no, sir, he didn't. He unzipped them, his pants. At this time, I think he had on dungarees, tennis shoes and a colored shirt, plaid with green in it. He had a zipper on his dungarees. Yes, sir, he took his private parts out. He then had intercourse with me. Yes, sir, he actually penetrated me with his private parts. This did not last very long, because I asked him [fol. 38] to stop before he got me pregnant. I don't remember what he said to that, but he stopped. After he stopped, I put my clothes back on, and he told us to walk down that road a little ways and across a white wooden bar in the road. We walked about 15 feet or more. While we were walking down that way, he was behind us with

the gun. After we walked down the road, he said, "Come on, I am going to let you go." So we went back up to the car, and he said, "Get in." So we got in the car, and he put socks on his hands; socks that you wear on your feet. When he did that, he said something about he was smart as a fox, or something like that. At that time, he said, "I don't want to leave any fingerprints on the car."

After that, he got in the car. He made Monty get in the back seat, and I was in the driver's seat. He got in the other seat, and he held the gun on Monty and told me if I tried to run off the road, he would shoot Monty. Then he made us drive off the highway and down a dirt road. We came to this little road on the left, and he told me to pull in and back out and leave the car on the main dirt road, and I did. He made us get out of the car and walk down the dirt road beside the road, down there in some bushes. He did not say anything while this was going on, I don't think.

After we walked down in the bushes, he told us to lie down on the ground. We were laying down, and he thought Monty picked up a stick and was holding my hand, and he told us to stick our hands up in the air. We did, and I kept begging him to let us go, because I said I had to go to work that night. I said I have to be home by 10:30 that night, because my brother would be worried about me because I had to go to work at 11:00 o'clock. I asked him to let us go. He said, "I can't do it; you will go to the cops." He said he was going to kill us. We begged for our lives, of course. After he made us lie down, Monty told him to tie us to a tree, that he wouldn't have [fol. 39] to kill us. He said, "What am I supposed to tie you with?" So, we told him that I had a white dress on the back seat of the car and a belt that goes to it, and Monty handed the belts and told him he could tie us to a tree with that and blindfold us with the dress. He made us walk back out to the car, and I got in the back seat and got the dress and my belts and walked back around where Monty was at, and he walked up to the door on the driver's side and took off his shoes. I am talking about Bumpers. He did not say anything when he took off his shoes that I remember.

After that, he made us walk back down through the woods and made me tie Monty to a tree with my belt. Monty had his hands behind him, behind the tree. I do not recall what size tree it was. I tied Monty to the tree. After that, Bumpers tied me to a tree, with Monty's belt. After he tied both of us, he ripped up my white dress and blindfolded and gagged Monty. Blindfolded him first. Then he gagged and blindfolded me. I don't remember how far apart the trees were; they were not very far apart.

I was not saying anything and the defendant was not saying anything while this was going on. After he tied and blindfolded me, he raped me again. He took my clothes off; I was tied to a tree. At this time, I was wearing Bermuda shorts and a poor boy sweater. I was wearing underwear, panties. He took my shorts and panties off and raped me again. On this occasion, actually penetrated my sexual organ with his privates. Yes, sir, he completed the act. He had an orgasm. His privates were inside of me when he did. While that was going on, he kept saying something about me being a little lady. That was all he said. During this time, he did not say anything to Monty.

After he had intercourse with me this time, he put my clothes back on, and he walked down and asked Monty where his heart was, and Monty said, "I don't know." [fol. 40] He stepped back and shot Monty, and then he reloaded the gun and shot me. I was shot through the left breast. The bullet went all the way through me. It came out right there (indicating). (The witness stands, faces the jury and indicates the point on her body where the bullet entered.)

THE COURT: You are indicating a point right under your left breast, is that correct?

WITNESS (continuing): Yes. (Witness indicates to the jury the position on her back where the bullet came out.) I am indicating a point just under my left shoulder blade. No, sir, I did not pass out when I was shot. The defendant did not say anything after he shot me. He just left. I heard my car crank up, and I called Monty, and he answered me. I heard my car leave then.

After the car left, I got my hands free, and I went down to Monty and untied him. Then we decided to go find some help. We didn't know where we were. It was a great big field out there, and I told Monty I was cold. So we laid down in the field, and I got warm. I told Monty we better go before he came back, and we went all the way across the field.

There was a big ditch there, and we jumped it and talked up the road to this farm house. We walked, yes, sir. We went to this great big white house. It was McPherson's house, I think. When we arrived at the house, I called for help twice, and a man answered and said, "What is wrong?" I said, "Will you come to your door; we have been shot." We were in his yard at this time, up on the porch. We yelled for help. Mr. McPherson came to the door. He asked us what happened, and we told him a Negro boy had shot us. After that, he went back in the house and got a gun and was going after him, and me and Monty and his wife talked him out of it. We told him to stay there. They called the Sheriff's Department and an ambulance. The ambulance came. I went to Alamance County Hospital in the ambulance. Monty and I both went in the same ambulance. It was [fol. 41] around eleven o'clock when we got to the hospital.

From the first time we saw the defendant Bumpers, until we got ourselves loose, was about an hour and a half. During that time I had an opportunity to hear him talk. I got an opportunity to look at his face, when he opened the car door. The light in the car come on. It was a full moon out there that night otherwise; we could see pretty clear.

When I got to the hospital, they took me to the emergency room, that is all I remember. I do not know what they did to me. I did not pass out; I had so much dope. I was so sleepy and drowsy, I don't remember. I think they gave me a shot. I stayed in the hospital two weeks. They did not operate on me while I was there. I just lay there. I suppose they dressed my wounds. I had occasion to talk to Sheriff John Stockard and S.B.I. Agent Minter while I was in the hospital. I talked to them about the

third day I was in the hospital; I am not sure. Mr. Minter and Mr. Stockard went in together when I talked with them. On that occasion the Sheriff and Mr. Minter showed me some pictures, a whole lot of them. I don't know how many, I would say around thirty or forty. They asked me if I could identify any of the pictures. I selected one picture out of the group as being a picture of the person who assaulted me that evening. I indicated that picture to Sheriff Stockyard and Mr. Minter at that time.

Of the group of twelve pictures in the manila envelope, marked State's Exhibit No. 1, this one, marked State's Exhibit No. 1A, is the one I indicated to Sheriff Stockard and Mr. Minter as the photograph of the person who had assaulted me on July 31. At the time I looked through the pictures the Sheriff furnished me, I had a conversation with Sheriff Stockard and Mr. Minter as to the events that occurred that night. I told them what happened to me. At that time I did not know the defendant Wayne Darnell Bumpers. I did not know his name. I did not tell [fol. 42] the Sheriff the name of the person who assaulted me. A member of my family was present during this visit of Sheriff Stockard and Mr. Minter to the hospital; I don't remember who it was; on one occasion, my sister was with me.

I talked with the Sheriff and Mr. Minter on several occasions. Later on, I had occasion to go to the Alamance County jail and observe a group of Negro males at the time, ten or twelve, I recall. At that time, I did not see the defendant Bumpers among the group at first; I was too afraid to look. I observed this group of men two times. On the first occasion I did not recognize the defendant Bumpers as being in that group, because I did not look. No, sir, I did not look at any of them. Later that day I went back and looked at them again. About five minutes after the first time. On the second occasion, I looked at the faces of all of the men. I saw a person I thought I recognized as Bumpers. Subsequent to that, I told Sheriff Stockard which one I thought was the defendant.

Dr. A. D. Tate, Jr. treated me while I was in the hospital. He made a pelvic examination of me at that time.

That was the first night I went over there. I recognize in the courtroom at this time the man that assaulted and shot me on the evening of July 31 (indicating). I am indicating the man sitting next to Mr. Norman Smith at the next table.

CROSS EXAMINATION

I am 21 years old. I was married October 26, 1963. I have only been married once. My husband is Bobby Warren Nelson. He is in the Army. He stationed at Fort Sill, Oklahoma, I think. Back on July 31st he was in the Army. No, I do not know whether or not he was on furlough awaiting some post of duty at that time. I do not know whether he was then at Fort Sill. I don't have any idea where he was at that time. I do not know now where his place of duty was; he wrote me a letter since then. I have been going steadily with Monty Jones since January [fol. 43] of 1966. I had not been dating anyone else. I went out with Monty just week-ends, twice on week-ends, once on Saturday and once on Sunday, ordinarily. I had had sexual intercourse before the night of July 31. No, sir, not with Monty Jones. I had gone with him steadily since January. I was parked with him. No, I wouldn't say I was in the habit of doing that. I park with him just once in awhile. I parked with him maybe once out of a month. We would no go to any particular place. I had never been up to this location near City Lake before.

I said I left Monty Jones' house about 6:30. Before we stopped at the City Lake, we drove Main Street a couple of times and rode around and went to City Lake riding. I would say we spent about half an hour driving around town. We did not stop anywhere. We did not get anything to eat; we had already eaten supper. We got out to City Lake about 7:50. On direct examination, a few minutes ago, I testified we got there about 7:30. I don't remember exactly what time it was. I didn't look at my watch that often. I had the radio on at the time. I was playing the radio while I was sitting there in the car with Monty Jones. The sun had gone down. No, sir, it was not dark; there was a full moon. Night had set in,

though. No daylight left. It was a clear night. The moon was already up.

I said my attacker came along shortly after I had arrived at the City Lake. We were riding out by City Lake and rode by this dirt road, and I backed the car up into it. I was driving; it was my car. A 1965 Corvair. It is a Corporal. The interior light on that cas is overhead. When you open the door it turns on and with the light switch. From the time my attacker came until the time he drove away in the automobile, I guess we were there about half an hour. Well, we were standing talking, of course. We were asking him to let us go, and I said something smart to him, and he hit me in the head. Then he [fol. 44] put me on the back of the car—I got on the back of the car myself; it isn't high. It is the hood, but it is in the back of the car. It slants down. My feet were on the ground. I physically resisted the attack. I grabbed the gun one time, and he drug me across a bush. No, all this time Monty was not laying in the back seat of the Corvair.

Before Bumpers told me to go around to the back of the car, Monty was in the front seat and Bumpers made Monty get in the back of the car. I went around the back, and he had the gun pointing at Monty's head. He pointed the gun at Monty's head while the two of us were on the back on the trunk. Laying back there, he had his hand on the trigger. While it was laying back there it was pointed at Monty's head. Monty had his feet in the seat back against the car, and his head was sticking up where Bumpers could see and shoot him.

No, sir, I have not lived in Alamance County all of my life. I am from Roxboro. I came here from Roxboro in 1963. These are the only two places I have lived. I live with my oldest brother now. I do not have any children. I am employed. I work at Glenn Raven Cotton Mill. I was working there prior to July 31, also. As far as I know, I am physically recovered from the attack. I intend to divorce my husband. I intend to remarry some day. I have no present intentions to remarry.

After I was first attacked, we went to a second location, in a direction away from City Lake. It was about

three or four miles. I was driving. I was not watching the speedometer. Yes, sir, my attacker drove the car on one occasion; he drove it away. Not while we were with him in the car; after he shot us and left us. While I was driving the car between the place of the first attack and the second, the gun was laying across the front seat pointed at Monty. I do not have any idea what time it was when we got to the second place. I said it might [fol. 45] have taken as much as thirty minutes at the first place. It was about 8:45 or something like that when we got to the second place. I said we arrived at the first place between 7:30 and 8:00 o'clock. I think we were there about ten minutes before the attacker came. And he was with us for thirty minutes. I guess that would make it sooner than 8:45 when we got to the second place. I don't have any idea how long we were there before we were abandoned.

I don't know what time we got to Mr. McPherson's house. I do not know what time the ambulance came. While I was in the hospital, the Sheriff and Mr. Minter from the S.B.I. came to see me about the third day, Wednesday. I don't remember exactly what conversation took place between me and the Sheriff and Mr. Minter that day. He asked me if I thought I could identify the person that did that, and I told him I thought I could. He did not say he had arrested somebody already. I looked at the pictures awhile ago, labeled State's Exhibit No. 1. There were twelve pictures. I don't remember exactly how many pictures there were when the Sheriff brought them to me that day. Awhile ago I said thirty or forty. I think this is the total number of pictures he brought to me. Two of these pictures actually appear to be of the same person, the two you indicate.

COUNSEL FOR DEFENDANT: I will ask that these be identified as Defendant's Exhibits 1 and 1A.

WITNESS (continuing): These are the pictures we referred to a moment ago; these two pictures are the same. At the time I talked to the Sheriff and the man from the S.B.I. I did not have any notion where the person was, from who attacked me, what part of the County,

or anything like that. No one said anything to me about a local man. One of these pictures is marked North Carolina Prison, Raleigh.

COUNSEL FOR DEFENDANT: I ask this be marked for identification as Defendant's Exhibit 1-B.

[fol. 46] WITNESS (continuing): This picture is marked Defendant's Exhibit 1-B, the one you showed me a moment ago, with Raleigh on it. I had made some kind of description of the person who attacked me before the Sheriff brought these pictures. I described him to the Sheriff's officers. I described the person who attacked me, he had thick lips, real dark, was wearing dungarees, plaid shirt with green in it and tennis shoes. I don't think I said anything about whether he was fat or thin. I tried to tell the Sheriff as much about him as I could. I tired to help him and provide him with as good a description as I could.

I had never seen this defendant before July 31. I know I saw him July 31. In my own mind I am certain, and nothing could really dissuade me from it. I haven't made up my mind; I know.

With respect to the line-up conducted in the Alamance County jail on the first time the people were lined up that I looked at, I walked in, stared at the floor and turned around and walked out. I was there long enough to know that a group of men were standing there. I glanced at a number of them. I glanced in the direction of the center; I just glanced up. I did not make any identification the first time. When I walked back out, I said No. 6. They were holding numbers, and we were supposed to tell them which number he was, and I was afraid to look at him. I didn't look at the face; I looked at the number. I told the Solicitor and the Sheriff something about No. 6 and hadn't looked at any faces, just looked at a number, because I was afraid to look at him. No, sir, I did not know he was No. 6 when I went in. I didn't even know which number he was the first time.

THE COURT: Let's stop right here a minute. You say No. 6 the first time you walked in there?

WITNESS: I said No. 6 after we came back outside.

[fol. 47] THE COURT: The first time?

WITNESS: Yes, sir.

WITNESS (continuing): I told Sheriff Stockard I was afraid to look at him, and I told him if he would let Monty go in there with me, I would look at them. I said No. 6 because I was afraid. I did not say No. 10, No. 1, No. 2, but said No. 6, because that is the one I glanced at. No, sir, I did not think No. 6 was the one who attacked me.

After that, Monty and I went in together. Then I identified Bumpers as being No. 2. I don't remember exactly where he was standing in line. I don't remember left, right or center. The second time I was in there, the people were required to call out their names, their first names. I knew the name of the person who was being held by the police was Wayne Darnell Bumpers.

I have never been convicted of any criminal offense.

I have seen the defendant on another occasion besides the time in the line-up and today; on July 31. I have never seen him any other time. Prior to the line-up I had seen pictures in the hospital. At that time, I had been given a pretty good impression of what the man's face was like in the picture. After the picture was given me, I did not have a better idea who he was then my recollection from the night of July 31. I remember him from July 31. Yes, it was dark July 31. It was full night. I was scared to death throughout the entire time I saw him. Not from the first minute he tapped on the window of the car; not until he said, "I am going to have to kill you." I was not excited when someone came and tapped on the car window when I was seated there.

At the time my attacker came up to the car, when I rolled down the window, he was standing up. All I saw at the moment was the rifle sticking between my eyes. I did not see his face at first. When I first got out of the car, I wasn't afraid. No, I was not afraid when the man made [fol. 48] me get out of the car and holding a rifle on me, because I thought after he asked for money, he would let us go. I thought we were going to be robbed. No, that did not cause me to be frightened or excited. In the hos-

pital I did not turn the pictures over and look at the names on the back. Yes, there are names on the back of them. I found out about one name on there awhile ago. I don't know how many names are on the back of them. I discussed my testimony today, in preparation for the trial, with Mr. Cooper.

REDIRECT EXAMINATION

In the conversation I had with you before the trial you told me to tell the truth.

MANSON MARVIN JONES, JR. testified for State:

My full name is Manson Marvin Jones, Jr. They call me Monty. I am eighteen years old. On Sunday, July 31, I got with Loretta Nelson sometime during the day. I first saw her after church, about Noon Sunday, July 31. I don't remember where I first saw her. Anyway, I got with her. I spent that afternoon with Mrs. Nelson. We went to dinner near Roxboro. This was some of her people. We got back from Roxboro about 5:00, something like that; sometime Sunday afternoon. I went to my house, and she changed clothes. She changed into a blue pair of shorts and a sweater-like thing. She had on a white dress before. My mother and father were at the house when Mrs. Nelson and I arrived. We stayed there and talked with them a little while. I had supper that evening at home. I ate with my parents. I left there with Mrs. Nelson, in her car, a '65 Corvair. Just me and Loretta left. It was about 6:30 or 7:00 o'clock when we left. We went riding for a little while, toward City Lake. I can't remember if we went riding anywhere else other than that. Yes, we went some place and stopped; she crossed some bridge, we turned left down that road, and [fol. 49] there was a dirt road, and she pulled into it. I am not familiar with the area around City Lake. I have never been out there to my knowledge before. It was dark when we arrived at this place where she pulled

off. I don't know what time. She pulled in frontwards and backed in. It didn't say anything about being a private drive. It was a field road. After we parked, I kissed her. I saw somebody that night other than Loretta. In about fifteen minutes Bumpers come and knocked on the window with a gun. I am indicating the defendant. He had a .22 rifle in his hand.

The first thing he said to me was, "Roll down the window." He was on the driver's side. She was still in the driver's seat. I was on the right-hand side. After he told us to roll the window down, he told Loretta to get out. At this time, he had the gun pointed at us. Loretta said, "No," at first, and finally she rolled the window down. After he told her to get out, well first he asked for money. He asked if we had any money, and we told him no, and we give him what little money we had. I was in the car at that time; he made her get out. I gave him about three dollars. That was all the money I had. I don't know what she had. She gave him some money.

After the money was given, he said that he wanted a white girl's p. . . . . I don't remember him saying anything else. He said he would kill her if she didn't give it to him, and she said she would rather die. He didn't say nothing then; he pointed the gun at me. I don't know whether he said anything, and she said, "All right." Then he told her to take her clothes off. No, I was not still in the front seat at this time; he told me to get in the back seat. Yes, he had the gun pointed at me at this time, not at her. She was outside against the car and he was back of her when I was told to get in the back seat. She grabbed the gun before it happened, and I crawled out the window and he got the gun back on me by the time [fol. 50] I got out, and he told me to get in the back seat and lay down, and he told her to take her clothes off. She took her clothes off. I didn't see nothing after that. All I could see was the gun up there on the back. This is a Corvair automobile. The back glass ain't too very big. The gun I saw I could see it through the back glass of the car; it was going across the trunk, the hood.

At this time, I was in the back seat of the car. I could have seen what was happening at the back of the car, but

I didn't. I tried to get out one time and he had the gun back on me, and the next thing I knew she was beside the car putting her clothes back on, and he told me to get out and walk down the road; told us to cross this bar that was across the road. Something put there to keep people from going down there, and I reckon it was steel or wood, iron or something. Yes, I walked down the road. Then he told us he was going to let us go. He told us to go back to the car. Then he got back in the car, and he told us to get in the car. He decided he wanted to go somewhere. He got in the car with us. Loretta was driving. He was in the front seat, and I was in the back seat. He had the gun on her and told her to go down the road.

We went down the paved road and got on the dirt road, down the dirt road a little ways, and we passed the road and he told her to back up. Bumpers was directing Loretta where to go. He would tell her which way to drive. He told her to back up in the road, and she backed up and turned around and he told us to get out; made us walk down the road. It wasn't a real road, it was more like a little drive or something; a field road. That was the road we had to walk down. We were walking down the field road or path. We did not go down that path too far; I don't know; not very far, about a block, not quite that much. Then he told us to lay down on the ground. While we were walking down the road, the defendant kept [fol. 51] saying he was going to kill us. All I heard him say is he was going to kill us. We tried to get him to let us go. She told him about tying us up and leaving us and taking the car. We told him we were married, and he would say, "I got to kill you." He said, "I got to kill you," making a noise-like. Made a noise with his teeth. He did not say anything else while walking down the road, as I recall. We was laying down on the ground. He asked if we had a stick, and we told him no, and he made us raise our hands, and then I told him about the belts and everything. I told him that he could take the belts and tie us and take her dress and blindfold us and leave us, and we wouldn't know which way he was going; that he could escape. He said he would do it.

He walked us back up to the car. This was after we laid on the ground. He was walking behind us. He still had the rifle in his hand. It was pointing at us. After we went back to the car, we got the belt and the dress and everything, and he walked us back down there. Loretta got the belt. He did not make any other statement while walking us back down to the place where we were laying down as I remember.

After we got back down in the woods, he made Loretta tie me up to a tree, and then he tied her to a tree. I was tied to the tree with rope; she tied her dress with a belt. It was a rope belt that ties a dress; a sort of cord. I was tied to the tree about like that (indicating); my hands on the opposite side of the tree from me. I was standing up. The tree I was tied to was about three car-lengths from the one Loretta was tied to. No, I could not see her from where I was. He blindfolded us after she tied me up. He blindfolded me with her dress. Just a few minutes it was quiet. Then he came over to me and felt my heart and asked if I was scared. He asked me where my heart was, and then he shot me. When he asked me where my heart was, I made no answer to that. When he asked me if I was scared, I don't think [fol. 52] I made any answer to that. I did not pass out when I was shot. I remember, I was conscious after that. I couldn't see anything; I was blindfolded. I slid down the tree; pulled the gag out of my mouth. I pulled that out and slid down the tree. After I was shot, I heard him go to the door of the car and take off.

I heard him shoot Loretta. I didn't hear anything after he shot Loretta. It was a few seconds after he shot me that he shot Loretta. I heard the car pull off. I was shot here (indicating to the jury). It went in right there (indicating). I am indicating now about the breastbone, in the middle of the chest. The bullet lodged in my back. It was still in me after I was shot. The doctor took it out three days after I was shot. The bullet lodged right back here (indicating). I am indicating a point four inches under my left arm; went down in my stomach and come back up. I don't know the doctor's name who took the bullet from my side; there were three or four of them.

This was in Chapel Hill hospital. I was transferred to Chapel Hill hospital. I stayed in Chapel Hill hospital two weeks.

I have recovered from my wounds. While I was there the doctor sewed up both sides of my stomach, took out my spleen and did something to my lip. I was operated on, the night I got there, Monday morning, August 1. After I heard the car start and drive away, I heard Loretta call me. I was able to answer. She asked if I was all right, and I told her yes. The next think I knew she was over at me trying to untie me, and I threw up, vomited. She got me loose. Then we went down across the field and rested in about the middle of it and walked down the road off the field. I got tired and went in the field, the other side of the field, and rested. I rested the second time. Then we walked down the road a little ways and seen this house and it looked dark. We didn't want to go down there, and we walked on to the next big house. I told her to holler for help, because I couldn't, and she [fol. 53] did. That was Mr. McPherson's home. We went to the home in that area. A man and a woman were there. We told them we had been shot, and the man came out there. I told him to call an ambulanee, and I was taken to the hospital. I have talked to the Sheriff and Mr. Minter about this occasion and told them what happened to me. The first time I saw them was in the hospital, not the Sheriff, but two policemen. I don't know who they were. They told me that they were members of the Sheriff's Department of Alamance Conty. They talked to me after I went to Chapel Hill, after the operation.

I went to the Alamance County Hospital. I stayed there about half an hour at the most. Then I was transferred to Chapel Hill hospital. The men who came to see me at the hospital in Chapel Hill showed me some photographs. I do not recall how many, it was a lot of them.

State's Exhibit No. 1 which you hand me are the photographs shown me at the hospital in Chapel Hill. They asked me to identify one of those photographs as my assailant, if I could. I did that. I am indicating State's Exhibit 1-A as the one I identified. I do not see either

of the men I talked to in the hospital here, neither Deputy Sheriff, or Sheriff, or anyone. I know that the man sitting beside you is the Sheriff; I don't know whether he came over there or not. Since July 31st and prior to that date, I had seen the defendant Wayne Bumpers in the line-up over at the jail. There were ten or fifteen people in the line-up. They had numbers, and he told me to tell which number it was. I told which number it was. That number was 6.

The rifle my assailant had on me out there July 31 was a .22 rifle. I couldn't tell too much about it. I was looking in the barrel most of the time. I wasn't looking at the gun very much. I couldn't identify it. I recognize the gentleman with red hair behind you. He is the one [fol. 54] I talked to in the hospital. He showed me the photographs you have shown me.

THE COURT: For identification purposes, the one with the red hair could be a lot of folks.

MR. ENNIS: Mr. J. N. Minter, of the State Bureau of Investigation.

WITNESS (continuing): I see the man who assaulted me on July 31 in the courtroom. (Witness indicates the defendant.) I am indicating the defendant Wayne Darnell Bumpers.

CROSS EXAMINATION

I do not recall when the officers first talked with me. They talked with me while I was in Chapel Hill. The attack took place on Sunday; they came the week following, the first time they came. They came twice. I don't know if it was the middle of the week; I slept most of the time. I can't say whether it was toward the middle of the week or end of the week. When they came in the hospital they asked me if any one of these was the one that shot me. Before they showed me the pictures, they told me they were policemen. They asked me what he looked like, before they showed me the pictures. I said he had a thin face, big nose. I don't remember saying anything else. This was the same day when the Sheriff and the S. B. I. came. I described my attacker to them. They produced pictures. I had not seen any law enforcement officers prior to that time that I remember.

I don't remember if I was interviewed that night at Alamance County Hospital. We got out to City Lake to park right after dark. It had become full dark. It was not a dark night, it was a full moon. After we left my house and before going to City Lake, we rode around a bit. I couldn't tell you where we went. Mrs. Nelson was driving the entire time. I do drive. No particular reason for choosing this place that we decided to park in. I reckon we went out with the intention of parking that night. I said awhile ago "making out." I meant just [fol. 55] kissing her; that is all. It doesn't carry any more meaning that that for me. I have heard it used to mean other things. I had been going with Mrs. Nelson about four months. I met her last year, when it was snowing. That was during the winter. After that, I did go with her right much; I would say steadily. I did not date other people. I took her out every weekend. We did park, not frequently. I had never had sexual relations with Mrs. Nelson.

The attacker came along and rapped on the door about fifteen minutes after we had got out on the scene. He was with us at the place about a half hour before we all drove off, something like that. I couldn't tell how far we went when we drove with him; I was looking at the gun. It would seem like a long time, ten or fifteen minutes. I did not try to escape at any time during this entire occasion. I told Loretta to stop, one time, when we were going in the car. That is when the attacker was in the car with us. I told her to stop before we turned on to the dirt road.

When we were back at the little road near City Lake, the gun was pointed at her and me off and on. While she was on the back of the car, the gun was actually pointed across the top of the car, the barrel was not aimed at me. I seen the gun. When I tried to get out, he had the gun back in his hand. This was a two-door automobile. I am eighteen. I was not 17 at the time. I turned 18 March 29th.

I have no idea what time it was when we arrived at the second place off the gravel road. We stayed there about 45 minutes, something like that; before we com-

menced moving off to find a place to get some help. I think it took about 10 or 15 minutes to get to Mr. McPherson's house. I have no idea what time we got to his house. No, sir, I am not a native of this area. I was born in Durham; moved here when I was little. I work at Throwing Mill, in Swepsonville. I am able to work. I [fol. 56] have no record of conviction of any crime or offense. I had never seen the defendant prior to the time I though I saw him July 31. I have seen him only once since then, in that line-up. And again today, in court. I looked at the men in the line-up twice. I went through alone the first time. The first time, I just walked down and walked back. I looked at all faces, going both ways. I decided that the person who attacked me was standing at a particular place in the line, about the middle. I don't know, facing the line-up, toward the left or the right of the middle. I think toward the left. He was carrying number 6.

After the first line-up, I told them the number. I told the Sheriff, I think. For the second line-up, me and my girl friend both went in. This time the people present were required to call out their names. This man called out the name "Wayne Bumpers."

I am not married. I have never been married.

I was tied to a tree at the second place we were taken. I couldn't tell nothing was going on where Loretta Nelson was. I had a gag in my mouth tied around the tree and blindfolded. My ears were not covered up. She tied me up first and then Bumpers tied her. I do not know if this took place one night after the other, with not much time in between; I was tied to a tree and blindfolded. I don't know how soon she was tied up after that. He came back with the gun in a few minutes. It wasn't too long. Everything went quiet. I could hear him moving his feet. I was scared. I was scared from the first moment this person came up to the car, and I was scared until he went away and even after that. Much of this took place in a wooded area. There were a good many trees around, and that had a tendency to make it considerably darker. At the second location, the car was pointed from the road, pointed left to right, from the road we were on

back to the woods; it was pointed right. It was pointed parallel to the gravel road. It was not facing into the [fol. 57] woods. The headlights were not beaming back into the woods. In the first location over near City Lake, the car was backed up into the road. The headlights of the car were facing out toward the road. Most of the things that took place over there were to the back of the car and the side of the car. There wasn't no woods there; it was open. The second place was in a wooded area. I did not hear the car stop on the road just before the man came up to our window.

Loretta Nelson and I have talked about our impressions of what took place since July 31. Several times. In our discussion we came to substantial agreement as to what took place. There were some points that were different between us originally. She seen him put his shoes in the car, and I didn't. I don't think there were any other points that were different.

I have talked to the people from the Sheriff's Department or other officers in connection with this case about five times, I believe. Twice in the hospital. One time in the recovery room, after I got out of the operating room, at Chapel Hill. Once in the line-up. That is all—only three times. Once at the hospital, the line-up, and that is about all.

I seen my attacker in the car. I knew what he looked like. I seen him in the car. I only knew what he looked like. I was with Loretta Nelson this morning when she came up here. I talked to her. I have not talked to her at all since she testified.

REDIRECT EXAMINATION

Before he got in the car one time, he put his socks on his hands, said he was going to be smart, so there would be no fingerprints. When I got back to the officers, I didn't describe the approximate location this took place.

JURY EXCUSED.

[fol. 58] The following matters were heard IN THE ABSENCE OF THE JURY.

THE COURT: Where is the motion to suppress now? You will recall, last week I had certain motions to be heard, motion to suppress evidence filed by the defendant's counsel. Procedure-wise, I have the motion before me and the petition to go forward with the evidence, but it is on an either/or basis here.

MR. COOPER: If you recall, the motion to suppress included certain clothing of the defendant which the State advised Your Honor last week we had no objection to, and we are not resisting that part of the motion.

THE COURT: There is a motion here that says the property seized against the will of Mrs. Hattie Leath and without a search warrant. Now, the question is, are we going into the search warrant?

MR. COOPER: The State is not relying on the search warrant.

THE COURT: Are you stating so for the record?

MR. COOPER: Yes, sir.

THE COURT: All right, then there is no search warrant question involved then; it is only permission?

MR. SMITH: Your Honor, I will confine the ruling, then, only to suppress and consent. I have already submitted affidavit.

THE COURT: Yes, I have that affidavit right before me.

MR. SMITH: I would like to know if the State would like to examine it.

THE COURT: All right. They are here available for cross-examination. They have made an affidavit of which [fol. 59] you have a copy.

MR. COOPER: I have some of them.

THE COURT: If you do not have her affidavit, here is a copy. Here are two copies with the original, if you would like to have them, Mr. Solicitor.

MR. COOPER: I have copies which counsel furnished me. I though he had filed additional affidavits.

THE COURT: I am considering the affidavit of Mrs. Hattie Lee and affidavit of Ronald Vaughn. Do you have those two?

MR. COOPER: Yes, sir.

THE COURT: You desire any further cross-examination of them?

MR. COOPER: Motion to suppress, Your Honor, please. For the record, Your Honor, please, reading from the original motion to suppress to indicate that the motion part of which we are concerned at this time, reads as follows: "Wayne Darnell Bumpers, the defendant in the above entitled action, hereby moves this Court to direct that certain property of which he is the owner, namely, one pair of overall pants, one shirt and one pair of tennis shoes, certain property of which his grandmother, Mrs. Hattie Lee, is owner, namely, one .22-caliber Remington rifle, and which on the afternoon of August 2, 1966, at his grandmother's house in Faucette Township, Alamance County, North Carolina, was unlawfully seized and taken from his grandmother Mrs. Hattie Lee and from her premises by four deputies and the Sheriff of Alamance County, whose true names are unknown to the petitioner, be returned to him and to Mrs. Hattie Lee and that it be suppressed as evidence against him in any criminal proceeding. The petitioner further states that the property was seized against his will and the will of Mrs. Hattie Lee and without a search warrant, as more fully shown by [fol. 60] the affidavit of Mrs. Hattie Lee and Ronald Vaughn attached hereto as Enclosures 1 and 2." It is my understanding the motion here involved only the .22-caliber Remington rifle which the motion alleges belongs to Mrs. Hattie Lee.

THE COURT: Is that correct?

MR. SMITH: That is correct, Your Honor.

THE COURT: Now, before I go any farther, I will make this remark as to your request here. You request that I change the name of Hattie Lee to Hattie Leath?

MR. SMITH: Yes, sir. It is stricken out in the original.

THE COURT: No, it is not.

MR. SMITH: It is not?

THE COURT: It is in the affidavit, but not in the motion. All right, now, go ahead, Mr. Smith.

MR. SMITH: First, Your Honor, I hope by the Solicitor reading this in the record he does not intend to

read it to the jury. I don't think anything connected with the motion to suppress constitutes admission.

THE COURT: Just for the record; that's all.

MR. SMITH: First, Your Honor, let me mention that the Statements of fact in the memorandum of law are not precisely correct statements contained in the affidavit, certain house where Mrs. Leath lives is closer to one mile than two miles from the road and there are a couple of other slight discrepancies. The memorandum was prepared in advance of the affidavit. I will refer to the affidavit. I don't think there is any material difference, but I didn't want to put myself in the position of placing things before the Court that are not fact. Now, with respect to the voluntary consent for seizure of items at [fol. 61] the subject premises, the cases disclose that there are four general rules, and one of these is that the burden is upon the State to prove voluntariness of the search and seizure.

MR. COOPER: If I might interrupt, if we could get the evidence in prior to the argument.

THE COURT: All right, sir. He has introduced two affidavits. Now, I think before we go into your brief we will have the evidence.

MR. COOPER: I take it the affidavit of Ronald Vaughn we are not involved with at this time, because it pertains only to clothing which has been returned to the defendant or made available to him at his request.

MR. SMITH: Right.

THE COURT: We have the affidavit of Mrs. Leath?

MR. COOPER: Yes, sir, and I would like to cross-examine her.

THE COURT: All right. Come forward, Mrs. Hattie Leath.

THE COURT: Let the record show this is still in the absence of the jury.

MRS. HATTIE LEATH, being first duly sworn, testified on DIRECT EXAMINATION as follows:

My name is Hattie Leath. I stay on Union Ridge, City Lake. I stay on Mount Vernon Road, almost a mile

off the highway. This highway is Mount Vernon Church Road. I am on a dirt road about a mile off the Mount Vernon Church Road. I own my own house; it belongs to me. I have two grandchildren stay with me, and I have another boy by the name of Kenneth Lee Olver lives with me, and then I have my own son, Junior. These folks were living with me in July 31. The defendant Wayne Darnell Bumpers was living with me on that date. He had been living with me practically all of his life, off [fol. 62] and on. I have raised him. He is nineteen years old. He has been living with me at this place all of his life. This place is just nowhere hardly from City Lake, about 200 yards right down on the lake.

On July 31st I owned a .22-caliber Remington rifle. I have owned it since my husband bought it. That is it.

MR. COOPER: I would like to have this marked for identification as State's Exhibit No. 2.

WITNESS (continuing): I recognize State's Exhibit No. 2 as being my rifle. It wasn't taped up like this on July 31.

THE COURT: No, the tape was not on it when you had it.

WITNESS (continuing): That is why I see a difference. No, I do not see any difference other than the Scotch tape being on the stock, according to my remembrance. I am just going to tell you. It has been a long time since the last time I took a look at the rifle. I did have a .22-caliber Remington, single-shot rifle at my house on July 31. Most of the time it stayed inside the wardrobe and then behind the door, out from the living room. This is my rifle.

Sheriff Stockard came out to my home about August 2, sometime about that. I reckon about two o'clock in the afternoon; I didn't notice the time. (Sheriff stands.) This man standing up beside you looks kind of like one of the men. Four of them came. I was busy about my work, and they walked into the house and one of them walked up and said, "I have a search warrant to search your house," and I walked out and told them to come on in. That little light-headed one younder was that one; not light-headed, but red-headed or something. (Mr. George stands.) That

is not the one. (Mr. Poe stands.) This is not the one. (Mr. Minter comes forward.) That is him. He just come on in and said he had a warrant to search the house, and he didn't read it to me or nothing. So, I just [fol. 63] told him to come on in and go ahead and search, and I went on about my work. I wasn't concerned what he was about. I was just satisfied. He just told me he had a search warrant, but he didn't read it to me. He did tell me he had a search warrant. I don't know if Sheriff Stockard was with him. I was not paying much attention.

I told Mr. Stockard to go ahead and look all over the house. I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything. Nobody told me they were going to hurt me if I didn't let them search my house. Nobody told me they would give me any money if I would let them search. I let them search, and it was all my own free will. Nobody forced me at all.

CROSS EXAMINATION

When the officers asked me to let them search, well, I will tell you what I thought about, what went through my mind. They didn't tell me what they was searching for, what it was all about. They didn't talk to me at all. They just went ahead. I had in mind what they was looking for and searching for, I felt like, well, whatever they was looking for they would find it, and I didn't think it would amount to anything with the boy, and I just give them a free will to look because I felt like the boy wasn't guilty. I am telling you what I though about it.

No, I did not think at all whether he had a rifle to keep them out of the house. I wanted them to be satisfied. He said he was the law and had a search warrant to search the house, why I thought he could go ahead. I believed he had a search warrant. I took him at his word. I though the search would be valid and there would be no reason to look at it; that is what I thought about it. When they first came up, I was there in the back room doing something. I don't know what I was doing,

but I do my housework back there in the kitchen. No, they [fol. 64] did not come into the house before I got to the door; they come to the door. No, they did not knock because I walked in the door. I saw them coming. I just seen them out there in the yard. They got through the door when I opened it. At that time, I did not know my grandson had been charged with crime. Nobody told me anything. They didn't tell me anything, just picked it up like that. The didn't tell me nothing about my grandson. (WITNESS EXCUSED.)

MR. COOPER: I have no further evidence to offer at this time on behalf of the State. I think the defendant's witness has proved the search was purely voluntary.

THE COURT: Anything further?

MR. SMITH: No, just argument.

THE COURT: It is not necessary that the argument be taken by the consent of the Court, Mr. Smith and Mr. Cooper, the Solicitor.

THE COURT: The Court finds that from the evidence of Mrs. Hattie Leath that it is of a clear and convincing nature that she, the said Mrs. Hattie Leath, voluntarily consented to the search of her premises, as is more particularly set forth in her evidence, and that that consent was specifically given and is not the result of coercion from the officers. MOTION DENIED for suppression of the evidence with reference to the .22-caliber rifle, marked State's Exhibit No. 2.

EXCEPTION to the ruling of the Court by the defendant—EXCEPTION #18.

(JURY RETURNS TO THE COURTROOM)

J. N. MINTER testified for the State:

My name is J. N. Minter, Special Agent for the State Bureau of Investigation. I live in Reidsville. I have been employed by the North Carolina State Bureau of Investi- [fol. 65] gation since October, 1957, until the present. Alamance County is within the district for which I am responsible as an Agent of the S.B.I. I had occasion to come to Alamance County sometime after July 31 to investigate a case involving Wayne Darnell Bumpers. I first came on Monday, August 1. On that day, I came to the Sheriff's office, and the Sheriff, Sheriff John Stockard, related to me what had happened during the night, that a boy and girl was parked on a Lovers' Lane, Monty Jones and Loretta Nelson, and they had been attacked by a colored male.

I did not talk with Mrs. Nelson and Mr. Jones that day. I eventually talked with Loretta Nelson about what had occurred. I was trying to think whether it was on the first Monday or second. I think I talked to her on August 2, Tuesday. Let me be correct. I did talk with her on Monday, August 1, in Alamance County Hospital, Room 404, in the afternoon, after lunch. She related to me at that time what happened to her in the evening before.

THE COURT: Members of the jury, the evidence being elicited from the witness S.B.I. Agent Minter, as to what the witness Loretta Nelson told him is not being offered as substantive evidence, but rather as corroborative evidence of the witness Loretta Nelson, if in fact you, the jury, find it does corroborate her, and for no other person. All right, proceed.

WITNESS (continuing): Loretta stated that on Sunday evening, July 31, her and Monty Jones were out riding around in the vicinity of Burlington City Lake in her 1965 Corvair. That they crossed the bridge at the City Lake and made a left-hand turn and went up the road a short ways to a side road and turned right on the side road, first pulling into a gate. She described it as a white gate. Then they backed out to the road and backed the car back to the gate. This was after dark. She said they had been sitting there about 10 or 15 minutes when a colored

[fol. 66] male walked up, tapped on the window. She said she asked him what did he want and he said to get out, and she refused. At that time, he flashed a rifle and ordered them to get out, again. So, she said she got out, her and Monty got out. They kept asking him what did he want, and he told her that he always did want a white girl. That they tried to beg off and get him to let them go. Finally she said she grabbed the rifle at one point and hollered for Monty to run and Monty come toward her and during the scuffle she got hit across the head with the rifle.

He later made Monty get back in the car and ordered her to strip and he laid her across the hood, which is in the rear of the Corvair where the motor is, and raped her while Monty was lying in the back seat. Then she put her clothes back on and he told her he wanted to ride up the road with them, and during this time she said they continued to beg him, told him she had to be at work at a certain time. So, they went on up the road approximately three miles, continued north out the Union Ridge Road, turned right on a dirt road, crossed a bridge and he told her to stop or turn here, and she went by a little wagon road that goes across a field, and he told her to back up and turn around, which she did. She backed up and turned around and headed the car back in the direction she came from.

That he got out and walked across approximately 100 yards, to a wooded area, at which time they stood there and continued to beg him and then he went back to the car and got a white dress she had in the back of her car and he went back and she tied Monty to a pine tree and blindfolded him and he was gagged. Then she was later tied up by the defendant with her belt and during this time, while she was tied to the tree, she was raped again, and then she was blindfolded and some time passed and then a little time passed. Then she heard a shot and she hollered for Monty and then later she was shot and [fol. 67] then she heard the car crank up and leave and she worked herself free and went over and untied Monty and he fell down on his knees and vomited. She got him

untied and they walked up the road to Tommy McPherson's home and summoned help.

She described to me the place the attack had taken place. At first she said after they crossed the bridge at City Lake, crossed the water; they turned left on to a paved road and went up this road for a short distance and then they turned right on to a dirt road, side road. Said it was a tobacco field and said they went down this road a short distance to a white gate. She said it was on a dirt road, off a dirt road, and in the pine trees where they were tied up. I later went to the place she described.

MR. COOPER: I would like to have this marked for identification as State's Exhibit No. 3.

WITNESS (continuing): The area where they were tied up was an open field for approximately a hundred yards, maybe less, and there was a small scrub pine. It wasn't tall pines and in this particular area there were only pines there, and just beyond that the hillside goes down into a hollow, which is a lot of oaks and other small trees. This road is a wagon road or a farm road, continues on by this spot on through a barbed wire fence into a pasture.

At the place she described, I observed some trees with some cloth material on it. The cloth was white, I would say, dress material, or cotton; one piece tied three or four feet above the ground. Some parts were laying on the ground, at the tree that Loretta was tied. The trees were approximately 15 feet apart where Monty was tied. There were some strands of thread from which cloth had been removed. Also, there were some signs at the bottom of the tree where someone vomited. The photograph you hand me, marked State's Exhibit No. 3, fairly and accurately describes the trees with the cloth tied to them [fol. 68] that I described. I did not find any glasses at the foot of either of the trees upon which the cloth was tied.

I had occasion to go to the home of Mrs. Hattie Leach later that week, on Tuesday, August 2. I went with Sheriff Stockard, Deputy George and Deputy Poe. I was wearing civilian clothes. As I recall, all of us were in

civilian clothes. I found a rifle at Mrs. Leath's house. I recognize the rifle, a .22-caliber, single-shot rifle, which has been marked for identification as State's Exhibit No. 2, which you hand me. This rifle was in the kitchen, back side of the house, sitting behind the kitchen door as you come in the front door, go to a hall and the kitchen. I took that rifle in my possession at that time. I took the rifle to Raleigh to our lab. I turned it over to Agent John Boyd. I later received it back from him and returned it to Sheriff Stockard. From the time I took possession of it at Mrs. Leath's house and until I gave it to John Boyd in Raleigh, and from the time I received it back from Agent John Boyd and turned it back to Sheriff Stockard, it was in my custody and under my control at all times.

MR. COOPER: I would like to have this marked for identification as State's Exhibit 4.

WITNESS (continuing): I recognize the manila envelope, marked for identification as State's Exhibit 4, which you hand me. That is a .22-caliber bullet that was taken out of Monty Jones. I received this from Dr. William Crutchfield, at Chapel Hill. After I received it from Dr. Crutchfield, I took it to Raleigh. I gave it to Agent John Boyd. I later got it back from him and returned it to Sheriff Stockard. From the time I received it from Dr. Crutchfield until I turned it over to Agent Boyd and from the time I received it back from Agent Boyd, until I returned it to Sheriff Stockard, it was in my custody and under my control at all times.

[fol. 69] MR. COOPER: I would like to have this marked for identification as State's Exhibit No. 5.

WITNESS (continuing): I recognize the manila envelope, marked as State's Exhibit No. 5, which you hand me. It is a .22 spent cartridge. This was found at the scene of the shooting. That is in the area where the cloth was tied on the trees. I took possession of it at that time. I took it to Raleigh and turned it over to Agent John Boyd. I later got it back and turned it over to Sheriff Stockard. From the time I took it in my possession at the scene until I turned it over to Mr. Boyd and from the time I received it back from Mr. Boyd and gave it to

Sheriff Stockard, it was in my custody and under my control at all times.

MR. COOPER: I would like to have this marked as State's Exhibit No. 6.

WITNESS (continuing): I recognize the manila envelope with card attached, marked for identification as State's Exhibit No. 6, which you hand me. It is a spent .22 cartridge, long. I received this from Sheriff Stockard. I took it to Raleigh and gave to to Agent John Boyd. I later received it back from Mr. Boyd and returned it to Sheriff Stockard. From the time I received it from Sheriff Stockard until I gave it to Mr. Boyd and, from the time I received it back from Mr. Boyd, until I returned it to the Sheriff, it was in my custody and control at all times.

When I talked to Loretta Nelson at Alamance County Hospital, I asked her to describe the pesron she claimed assaulted her that evening.

THE COURT: This is offered to corroborate Mrs. Nelson, if it does, this part about the description.

WITNESS (continuing): She said—

MR. SMITH: Objection. The witness appears to be reading.

THE COURT: He can refresh his recollection from his notes. Overruled. Did you make those notes?

[fol. 70] WITNESS: Yes, sir.

THE COURT: Overruled. You can refresh your recollection by looking at your notes.

WITNESS (continuing): She said at the time he was dark-skinned, long face, thick lips; he weighed about 145; he was dark, had black hair, kind of raised up a little, didn't stick too close to his head, and at the time he was wearing dungarees, white tennis shoes and a plaid shirt. At that time I showed Mrs. Nelson some photographs of colored males. The following day, Tuesday, August 2. She picked out a photograph and identified it as being the person who had assaulted her. She was shown twelve photographs. We had the pictures numbered from 1 to 12, and she picked out picture #5, which was Wayne Darnell Bumpers. At the time we went to Mrs. Hattie Leath's house and secured the rifle, which has been marked for

identification in this case, the defendant Wayne Bumpers was not under arrest.

I was subsequently present in the Alamance County jail when Mrs. Nelson and Mr. Jones were asked to observe a line-up in the Alamance County jail. We had ten colored males running in various ages, and each one was given a card numbered 1 to 10, and each individual staggered himself at different parts of the line. They were not numbered 1, 2, 3, that way. They were staggered and each victim was asked to come in and view the line-up. They went in separately. The first time they went in separately. After Mrs. Nelson and Mr. Jones had observed the people there in the jail, I believe they repeated a number to the Sheriff first, and later they repeated it to me. They both went in twice.

CROSS EXAMINATION

I am with the State Bureau of Investigation.

MR. COOPER: We have a doctor from Memorial [fol. 71] Hospital at Chapel Hill I had called, and I would like permission of the Court to put him on for just a few questions so that he can get back.

THE COURT: All right, the Court in its discretion will allow you to do so.

(Witness Minter is excused.)

DR. WILLIAM M. CRUTCHFIELD testified for the State as follows:

I live in Chapel Hill, N. C. I am a licensed physician by occupation. I received my training with reference to becoming a doctor at the University of North Carolina Medical School. I attended undergraduate school four years and four years of medical school. I am now at present in interne at North Carolina Memorial Hospital. I have been an interne in North Carolina Memorial

Hospital from July 31 to the present time. I had occasion during that time to treat Manson Marvin Jones. As I remember, Mr. Jones was admitted to the hospital early one Monday morning, about 2:00 o'clock, on August 1, and I saw him first in the intensive care unit at Memorial Hospital. At that time, Mr. Jones had allegedly been shot with a bullet of unknown character. Entrance wound was just at the right of the ziford (spelling?).

THE COURT: The what?

WITNESS: Ziford (?).

THE COURT: Wait a minute, Doctor. Instead of using medical terms, use terms those twelve jurors on the stand can understand.

WITNESS (continuing): This is commonly called the breastbone, the small bone you can feel at the bottom of the chest, the terminal end of it is called the ziform. I apologize for using the term. On examining Mr. Jones at that time, he had a very tender abdomen. His belly wall was quite tender. There was no bowel and quite hard and this meant he had some injury internally. He also had air that you could feel under the subcutaneous, that is the tissue right under the skin, the left side of the [fol. 72] chest wall. There was no exit wound of this missile. After treating his initial injury and evaluating him, treating him with intravenous fluids and supporting him, we decided that an operation to explore his abdomen was necessary and approximately two hours after he was admitted, he was taken to the operating room where he underwent exploratory laporotomy, that is exploring his abdomen.

Dr. Hartzog, our chief resident, I assisted Dr. Hartzog with this operation. The missle track indeed went through the anterior or front portion of the diaphragm, went through the left side of the liver, through the lower part of the stomach and lacerated or injured the spleen, an organ in the left side of the abdomen, and you could feel the bullet underneath the skin on the left side of the chest. We treated him appropriately by—the liver was not bleeding, so this area was drained to prevent infection. The holes in the stomach were sewed up, and the spleen had to be removed because it was bleeding. He

tolerated the procedure very well and was transferred back to the floor.

The bullet was not removed at this time for many reasons, one being the area had a lot of air in the skin. It was then a little more difficult to get it out at that time, and the bullet was causing him no trouble in the position it was in. We did not want to prolong his operation to remove the bullet at that time. We knew that as the air went down, we could get this bullet out with no trouble. Over the next five or six days we treated Mr. Jones with antibotics to prevent infection. He had to have some blood transfusions. I am sorry, I don't remember the exact number, and supported him over his injury. Six days after he was admitted to the hospital, he was doing quite well, and we decided at this time we could safely, the air had gone down somewhat under the skin and we could feel the bullet right under the skin. So in his room, with a [fol. 73] little bid of anesthetic known as xylocaine, which the dentists frequently use, we put this in the skin, made a very small incision, and the bullet popped right out. After I removed the bullet from his body, I wrapped it in a piece of sterile gauze, and I put it in an envelope that we have in the hospital and sealed the envelope with tape, gave it to a nurse and watched her lock it in the nartocits cabinet.

It happened to be on a Sunday this bullet was removed, and the next morning the bullet was taken to the administrative office and locked in the safe until an Agent from the SBI arrived to receive it. I was called when the Agent arrived and went down to identify the bullet in the envelope and gave it to the Agent from the S.B.I. I remember the Agent. I am sorry I forget his name, but the gentleman sitting there (indicating). This is Mr. Minter, the Agent to whom I gave the bullet. I can identify the envelope you hand me, marked for identification as State's Exhibit No. 4. This is the envelope I sealed the bullet in. It has my signature and the date and reads: "Missile removed from Manson Jones on 8/7/66," with my signature on it. This envelope contains that bullet.

MR. COOPER: I did not do it before, but I submit Dr. Crutchfield as an expert witness in the field of medicine.

THE COURT: All right, it is so held by the Court.

CROSS EXAMINATION

I can't say for shre whether this bullet struck any bone area; there were no fractures.

(WITNESS CRUTCHFIELD IS EXCUSED.)

J. N. MINTER, RECALLED FOR CROSS EXAMINATION:

I have been with the S.B.I. since October, 1957. Before that I was the Reidsville Police Department since [fol. 74] August of 1946. I talked with Mrs. Loretta Nelson Monday, August 1, the first time; talked to her on August 1, 2, and August 4, I believe. When I talked to her on August 1, she related what happened, how it happened and gave a physical description. I brought the photographs in on August 2. All of the photographs did not have persons' names written across the back of them. They might now, I don't know. Some of them did and some just had on the front where they are usually identified by number, where they will know which department taken the pictures. Some of the cards have names on them, as well as I remember. Some of them did have names on them.

The card of the defendant had a name on the back side. Looking at State's Exhibit No. 3, which I said previously was a picture of the scene where part of the action took place, looking at the pine trees in the background, I would say that that appears to be a fair portrayal of the way the forest was at that place, along this field, among the edge of the field, was pines all around it and on down the hill were oak trees, etc.

The two trees where there are some pieces of cloth appear to be back in the pine trees; they sit back a little, not too far, the first right on the edge. The other sits about 15 feet back. I would say these pine trees are 20 to 25 feet tall, just guessing. My investigation took me to the place where it was described earlier as being near the City Lake and a barrier, with a small dirt road. Yes, sir, in my testimony I have identified the .22 cartridge as having been found at that location. This picture that I just looked at portrays one place where I investigated. I investigated in another area a few miles from there, the scene that was where they were first parked at, this white gate described as an iron gate painted silver, if you continued down through this road, you go into City Lake. I have not identified any items of interest as having come from the first place they parked.

[fol. 75] After I got this bullet from Dr. Crutchfield, I took it to Raleigh and then turned it over to Agent Boyd, Ballistics. I came back in possession of it after that. Agent Boyd turned it over to me.

The line-up in the County jail was on August 16. It is true that when Mrs. Nelson first came into the line-up she looked toward the middle of the line-up and examined something in that area and walked out. She walked in and made a circle about halfway and right back out of the line-up. She had her head hung down. I couldn't pick out any particular spot she was looking at. When Mrs. Nelson first got back out of the line-up, the first time, she said she picked No. 6. I think she talked to Sheriff John Stockard first, and I later walked out and she did say 6. That wasn't the defendant's number. The first occasion the defendant's number was 7. The second time in the line-up the persons in the line-up were required to state their names, as a matter just for voice. On the second time they went in, after the persons in the line-up were required to state their names, the purported identification was indicated to me by Loretta Nelson and Monty Jones.

The first time Monty Jones came back and gave the right number to me and to Sheriff Stockard. The second time after they stated their names that Monty Jones and

Loretta Nelson identified them; on the second time Loretta Nelson identified No. 2, also Monty Jones identified him on the second occasion as No. 2. He had been rearranged in the line-up and given a different position. He had been required to state his name.

ONNIE LAUGHON testified for the State:

I am employed by the Alamance County Sheriff's Department. I had occasion to go to the scene of this crime in my official capacity as Deputy Sheriff on August 1, [fol. 76] this year. I can identify the envelope you hand me, with tag attached, marked for identification as State's Exhibit No. 6. It is a .22 cartridge. I found it over near the scene on the Sardin Mill Road, 60 feet from the tree that Mrs. Nelson told us she was tied to. I examined the tree to which Mrs. Nelson had been tied. I found pieces of a dress torn up; it was white, thick knitted dress-like. I found something at the base of the tree. I found a pair of glasses, ladies' glasses; little kind of funny-shaped glasses.

SOLICITOR: I would like to have this marked for identification as State's Exhibit No. 7.

WITNESS (continuing): The photograph you hand me, marked for identification as State's Exhibit 7, fairly and accurately represents the position of those glasse at the base of the tree as I saw them there on August 1. The glasses and the cartridge I found, I turned them over to Sheriff Stockard. I can identify the pair of glasses you hand me, marked as State's Exhibit 8; these are glasses similar to the ones I found beside the tree. From the time I took possession of the glasses and turned them over to Sheriff Stockard they were in my custody and control at all times. I also found three belts and a black scarf or net-like, something like a woman would put over her hair, or something of that nature, around the tree.

SOLICITOR: I would like to have these marked for identification as State's Exhibit 9.

WITNESS (continuing): I can identify State's Exhibit 9. These belts were around the tree that Mr. Jones was tied to. I brought those into the office and turned them over to Sheriff Stockard. I say around the tree, I don't mean tied around the tree, but they were around the base of the tree. I recognize the paper bag you hand me, marked as State's Exhibit No. 10. This is material that was used to tie the people to the tree. I found the [fol. 77] material around the two pine trees. The white cloth I just identified came from the trees, as represented in State's Exhibit No. 3, which you hand me. I turned that cloth over to Sheriff Stockard.

CROSS EXAMINATION

I found the shell case 66 feet from the tree Mrs. Nelson was tied to, between the tree and the Sardin Mill Road, where the car was parked, which would be east of the tree. No, I was not with the group from the Sheriff's Department that went to Mrs. Leath's house the week after the occurrence took place. I had nothing to do with any of the information released to the press. I am Onnie Laughon. I could have given some information to the BURLINGTON TIME NEWS published on the first of August, 1966, but I didn't give a full report. I mean by that, at that time we didn't know a whole lot about the case. I could have given some information on it. I don't deny it.

I don't deny giving the information to the press that the prosecuting witnesses "were found on an unpaved road off the old Stoney Cheek Church Road, north of Burlington," but we didn't see these people that night on the Sardin Mill Road. We didn't find them. I don't deny giving the same newspaper a quotation at the same time saying that, "they said," by that I meant Monty Jones and Loretta Nelson, "they said they were parked on the road and attacked by a Negro man." I could possibly have said such a thing. I deny having given a report to the ALAMANCE NEWS, published in Graham on the 4th of August, 1966, "Bumpers is accused of accosting the Burlington young people Sunday night as they were parked

on the shoulder of a rural road, in Caswell County, near the Caswell County line." I do not know when the name of this defendant was first released by the Sheriff's Department and printed as being the Sheriff's Department's prime suspect in this case. I did not have anything to do with getting up photographs taken to the hospital for [fol. 78] the prosecuting witness to examine.

JOHN H. STOCKARD testified for the State:

I am employed by Alamance County as Sheriff. I am the duly elected, qualified and acting Sheriff of Alamance County and was so on July 31, 1966. I can identify the envelope you hand me, marked State's Exhibit No. 6. It is a .22 cartridge that has been fired. I received it from Mr. Laughon. I put it in my safe and then turned it over to Mr. Minter with the S.B.I. Subsequently, I received it back from Mr. Minter. From the time I received it from Mr. Laughon, until I gave it to Mr. Minter, and from the time I received it back from Mr. Minter, until today, it has been in my custody and under my control at all times. The rifle you hand me, marked State's Exhibit 2, was in my possession. This was taken from the residence of Mrs. Leath, taken to the SBI in Raleigh and returned to me by Agent Minter. From the time I received it from Agent Minter, until today, it has been in my custody and under my control at all times.

The envelope you hand me, marked for identification as State's Exhibit 5, has been in my possession. This was taken at the scene, given to Mr. Minter who, in turn, took it to Raleigh, who in turn brought it back and gave it to me. From the time I received it back from Mr. Minter, it has been in my custody and control at all times. The envelope you hand me, marked for identification as State's Exhibit No. 5, has been in my possession. I received this from Mr. Minter when he returned it from the the State Bureau of Investigation. Since receiving it, it has been in my custody and under my control at all times.

The glasses you hand me, marked for identification as State's Exhibit 8, were received by me from Mr. Laughon,

which, in turn, I took them to the hospital and gave them [fol. 79] to Mrs. Nelson. There is no difference between these glasses marked for identification as State's Exhibit 8 and the ones I received from Mr. Laughon.. The belts you hand me, marked State's Exhibit 9, have been in my possession. I received them from Mr. Laughon, and they have been in my possession ever since. The sack of cloth you hand me, marked for identification as State's Exhibit 10, has been in my possession. I received them also from Mr. Laughton, and they have been in my possession since.

CROSS EXAMINATION

To the best of my knowledge, the Sheriff's Department first released the name of the defendant as being the State's prime suspect on August 4, the day after he was arrested. To the best of my knowledge it was actually printed in the newspaper on that date.

THE COURT: It was released as the prime suspect, is that what you said?

WITNESS: It was released that he had been arrested and charged.

It could have been printed in the BURLINGTON DAILY TIME NEWS on August 3 that the defendant was a suspect; I am not sure, but I know it was not released until he was arrested. I believe he was arrested on the morning of the 3rd. Mr. Minter and I were the ones who got together the collection of photographs that were shown to Monty Jones and Loretta Nelson. We tried to take them as near the description she gave us, plus the fact that they were men from that area. Actually, some of them were quite different in description from that description. I believe I did see the defendant Wayne Darnell Bumpers in the courthouse here Tuesday morning before he was arrested. In fact, he was on his way up to do some business in the courthouse. I was not planning to arrest him at that time. I had not determined at that time that he was the man I was looking for. I did not arrest him on the second; he was arrested on the third.

[fol. 80] JOHN BOYD testified for the State as follows:

I live in Raleigh. I am employed by the State Bureau of Investigation, Special Agent in charge of the Firearms section of the Crime Laboratory. I have been employed by the State Bureau of Investigation going on 15 years. I have a specialty in the field of criminal investigation on which I work, firearms identification and ballistics work. I have received specialized technical training at the manufacturing plants, Smith & Wesson, Colt, Remington, Winchester, DuPont Powder Plant, and H. P. White Ballistics Laboratory, and have been gainfully employed in this work going on 15 years. I have occasions during my experience with the S.B.I. to make comparisons of cartridge cases, bullets and firearms, to determine whether or not a certain firearm shot a particular shell or bullet. I have made this type of comparison thousands of times.

MR. COOPER: I submit the witness is an expert in the field of firearms identifications and ballistics.

THE COURT: The Court holds that S.B.I. Agent John Boyd, in charge of the Firearms section of the S.B.I., in Raleigh, North Carolina, is an expert in the field of firearms identification and ballistics.

WITNESS (continuing): I can identify the rifle you hand me, marked for identification as State's Exhibit No. 2. This is a .22-caliber, single-shot Remington rifle. I received this from Alamance County Deputies Oakley and Laughon. I made the identifications or performed a test on that rifle. I can identify the envelope, with tag attached, marked for identification as State's Exhibit No. 6, which you hand me. This is a fired .22-caliber cartridge case. I had occasion to make a test on that cartridge case. I also received this from Deputies Oakley and Laughon. I can identify the envelope you hand me, marked for identification as State's Exhibit 5. This is also a fired [fol. 81] .22-caliber cartridge case. I had occasion to perform a test on that. I can identify the manila envelope you hand me, marked for identification as State's Exhibit 4: This is a .22-caliber spent bullet. I had occasion to perform an examination on that. I had occasion to examine the rifle, State's Exhibit No. 2; the two cartridge

cases which are State's Exhibits 5 and 6, and the bullet which is State's Exhibit 4, to determine if those cartridge cases and that bullet were fired by that rifle. My test showed that this rifle, State's Exhibit No. 2, fired both of these cartridge cases, State's Exhibits 4 and 5, and also fired this bullet, State's Exhibit 6.

THE COURT: Let me see. State's Exhibit 4 is the .22-caliber spent bullet, is that right?

WITNESS: Yes, sir, I'm sorry, sir. My test showed that State's Exhibit 2, the rifle, fired this spent bullet, State's Exhibit 4, and these two cartridge cases, State's Exhibits 5 and 6.

WITNESS (continuing): After making these tests, I returned State's Exhibits 2, 4, 5 and 6 to our Special Agent J. N. Minter. From the time I received them until I turned them over to Mr. Minter, they were in my custody and under my control at all times.

CROSS EXAMINATION

I have no idea how old that rfle is. As an expert in ballistics, I could have some notion what age that gun is. I could do this by test purposes, but I can't do it here on the witness stand. I did not make any effort to determine the age when I performed the tests in Raleigh; no examination of this type was conducted. No, it is not quite obvious it is an old rifle. It does appear to me to be quite rusty. It does not appear to me to be worn, particularly around the working surfaces in the chamber and various places, not to any great degree. I did not disassemble the gun when I had it. I made no effort to take [fol. 82] it apart. I fired some test bullets through the gun, into absorbent cotton. I fired three test bullets. I did not take any pictures comparing the test bullets to the bullets on exhibit here. No, sir; it is not ordinarily considered to be good practice in preparing for a courtroom presentation to take pictures of the test bullets and compare them with bullets in evidence.

In examining the test bullet as against the bullet which is one of the exhibits, I used a Standard Laboratory Compound Microscope, with an Optical Bridge, allowing

the viewer through one eye-piece to examine two objects in position to each other for comparison purposes. Through a microscope, you can only see the bullet from one position. I look at the other positions after I looked at it once. I examined the bullets and the cartridge cases on their entire surface, the bullet on each rifling, from one end to the other and the entire surface of the projectile itself.

I cannot answer the question, the science of ballistics is not truly an exact science. I have not made a mistake to my knowledge. Well, now, sir, yes, sir, there could be mistakes I wouldn't know of; we are dealing in the realm of possibility or probability? In the realm of probability, it is very unlikely, because of the law of probability, that was not calculated by me, but has been calculated for publication, says that for the same weapon to fire two bullets that would be different or for two different weapons to fire bullets that are the same would incorporate all the weapons that have ever been manufactured from the beginning of firearms to now, and on the present rate of manufacture, all the weapons that will be manufactured for the next twenty-some years. To be different or the two bullets from different rifles to be the same, the same law of probability. When guns are damaged or worn or decomposed in any manner, this tends to make it much more identifiable from wear, rust, corrosion; much more positively identifies a weapon with a bullet or [fol. 83] cartridge case. No, sir, if it had so many obscuring marks, it does not end up almost entirely void, almost completely of characteristics; I have never known of such a situation; it always improves the situation rather than deteriorates it; it makes it better. I can't answer the question, if I believe there is a point beyond which it deteriorates that would hinder my determination, because this tends to improve it rather than deteriorate it. You may look at the bullet. This bullet would not go back inside that rifle unless you put it there. It would fit in there. No, sir, it is definitely not true that a bullet gets so it is standard after having been fired so that one can get it back in the barrel again. I did not put it back in the barrel.

In my opinion, this bullet is not quite badly scarred on one side, with reference to the term "badly scarred," no, sir. It has some damage on one side; it is not an extensive damage, no, sir. Part of it is not missing, in my opinion. I do not know what all these scratch marks on it are.

I can't answer the question, did they aid my investigation, unless you specify to me, sir, what you are talking about. On one side of the bullet a bunch of scratch marks, yes, sir. It shows through a different color, a bright color where all the scratch marks are. This didn't aid my investigation. No, sir, it did not hinder it in any way, because this part of the bullet does not come in contact with the barrel. I didn't say there is a whole side that doesn't come in contact with the barrel. That is not damaged on the side; that is damage on the nose of the bullet, and the nose of the bullet does not touch the barrel as it passes down the barrel. No, sir, I said the sides; the bottom end does not come in contact. In the case of this type ammunition, the lower third of this bullet is all that comes in contact with the barrel, and the [fol. 84] surface used for identification purposes has very little damage to it; the nose has some damage. I used the same method in identifying the cartridge cases. I put them under a microscope. I did not go out and get new cartridges and introduce them into the gun and fire them. I used cartridges that I already had in my ammunition supply, new. I fired them, took them out and compared them. Breech face, firing pen, ejector and extracting marks are the kind of marks I compared on them.

No, sir, I did not necessarily find that all these places was just some surface that had come in contact with the shell and knocked against it. If you will, sir, some of the markings that I compared had nothing to do with pressure. Ejector and extractor are not pressure marks; they are scrape marks, one piece of metal against another, one being harder marks the softer metal. The ejector and extractor of this particular weapon are so designed that it will mark the soft copper of the cartridge case rather than damage the ejector and extractor. It has nothing to do with pressure marks.

The firing pin is a pressure mark, yes, sir. Breech face is a pressure mark caused with the cartridge case explodes in the chamber the same amount of pressure that pushes the bullet out of the barrel, pushes the cartridge case back against the breach case or bolt, the breech face or bolt being a hard piece of metal and, rather than damage it, it damages the soft cartridge case and marks it. I did not put the shells that have been introduced as exhibits back in the rifle at any time while I was testing them. The only marks I can work with, sir, are the lands and groove marks imparted to the soft lead bullets by the steel barrel. I examined both the lands and groove marks. Basically, sir, I am familiar with the work of Paul L. Kerr, textbook which deals extensively with ballistics. I consider him an authority in some fields, not necessarily ballistics. [fol. 85] I am familiar with the volume known as "Modern Criminal Investigation," Harry Soddoman, John H. O'Connor. I consider that an authority on police arms. I did not find the lands of this gun were worn badly. No, sir, no part of the bullet offered as an exhibit which was supposed to be there was missing; the entire bullet is here.

DR. ALLEN D. TATE, JR. testified for the State:

I live in Graham. I am licensed to practice medicine in this State, for eighteen years. I am not licensed to practice in any other State. I received my medical training at University of North Carolina Medical School and University of Maryland Medical School. I am a general practitioner. I am not licensed by any other State Board or Commissions or Colleges or anything like that.

COURT: The Court holds he is a medical expert in the general practice of medicine.

WITNESS (continuing): I had ocassion to examine Loretta Nelson on the evening of July 31, this year. I made a pelvic examination. This is an examination of the female organs externally. I made this examination to determine whether or not there was sperm present. The

examination of the slide made under microscope did show the presence of sperm. I was not able to tell how long it had been there. I examined Mrs. Nelson's forehead. She had a contusion and also a laceration of her forehead, about the hairline, just to the left center. It was bleeding slightly. A contusion is a bruise and a laceration is a cut. I had to take three stitches in it. Based upon my examination of Mrs. Nelson, I would say that she had engaged in sexual intercourse within the past 24 hours prior to the time I saw her.

[fol. 86] MRS. LORETTA NELSON (RECALLED) testified on REDIRECT EXAMINATION:

I lost my eyeglasses during the events to which I have testified. I lost them when I was blindfolded; he took them off and put them in my hand. When I got loose, I dropped my glasses and forgot about them. I subsequently got them back. Sheriff Stockard brought them to me when I was in the hospital. They are the glasses I am wearing now, marked for identification as State's Exhibit No. 8. I can identify these belts which are marked for identification as State's Exhibit 7, which you hand me. These two belong to me. The gold belt and the brown leather belt belong to me. And this is Monty's, the dark leather belt. This one (indicating) I used to tie Monty, the gold; and this was used to tie me. The gold one and the brown leather one were used to tie Monty to the tree. The dark leather was used to tie me to the tree.

I can identify the bag of white cloth, marked for identification as State's Exhibit 10, which you hand me. This is the white dress I wore to church. It was laying on the back seat of my car. During the events, he tore it up and used it to gag us. Wayne tore it up. The defendant. I saw him do it. I do not know how many pieces he tore it into; there were several. He gagged and blindfolded us with it. When we got loose, that cloth was still on the tree to which we were tied. We didn't make any attempt to take it off the tree.

RECROSS EXAMINATION of Loretta Nelson:

I don't remember if, after the first line-up, Monty Jones also called out No. 6 after we got out. I called No. 6. I don't remember what he called out.

ONNIE LAUGHON (RECALLED) REDIRECT EXAMINATION:

I had occasion to take State's Exhibit 2, 4, 5 and 6, the [fol. 87] rifle, the bullets and two cartridge cases, to Raleigh to Agent John Boyd of the State Bureau of Investigation. Sheriff Stockard asked me to take them. I received them from Sheriff Stockard and turned them over to Agent Boyd.

RECROSS EXAMINATION of Onnie Laughon:

I told you earlier that one of the cartridges came from 66 feet away from the tree. I don't know where the other one came from; I wasn't there when it was found. I first saw the other one at the office.

SHERIFF JOHN H. STOCKARD (RECALLED):

REDIRECT EXAMINATION:

I was present when the cartridge marked for identification as State's Exhibit 5 was found. It was found almost highway between the two trees, off to the right a little ways, the two trees the victims were tied to. I had occasion to go to Mrs. Hattie Leath's house, and I had occasion to go to the spot where I found the cloth on the two trees. The distance between the two places is approximately two and a half or three miles. This is a road between the place and the home of Mrs. Hattie Leath. I did not examine Mrs. Loretta Nelson's automobile for finger-

prints; I had it done. It was done partially in my presence, under my direction. There were some fingerprints found in the car. I do not know whose they were. The defendant's fingerprints were not found in the car.

RECROSS EXAMINATION of Sheriff Stockard:

To get from the home of Mrs. Leath to the place where the two trees are, well, there is a dirt road leading from Mount Vernon Church Road, I believe it is, into the Leath residence, which, I would say, is approximately a half or three-quarters of a mile, I am not sure. After you hit the paved road, you turn to the right and go approximately two miles, I would say a mile and a half, until you come to an intersection, you bear to your right, and there is [fol. 88] an unpaved road, I believe it is known as the Sartin Road, and up that road, maybe, three-quarters of a mile, a half or three-quarters. The cartridge case I spoke of is a different one from the one Mr. Laughon said was 66 feet from the tree. I did not pick up any cartridge cases when we were at the home of Mrs. Hattie Leath. We looked, but didn't find any.

REDIRECT EXAMINATION of Sheriff Stockard:

I went to the place of Mr. Jones and Mrs. Nelson first saw the person that assaulted them, the place where the bar is across the road. By the road, I would say that that is approximately one mile; through the woods, I would say maybe half a mile.

MR. COOPER: I would like at this time to introduce State's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 into evidence.

THE COURT: Allowed.

MR. COOPER: I request permission to show 1 and 1A to the jury.

THE COURT: Granted.

MR. COOPER: I would like to show Exhibits 3 and 7 to the jury.

THE COURT: Granted.

THE STATE RESTS.

MR. SMITH: Defendant makes a motion for judgment of nonsuit.

THE COURT: Denied. Exception.

EXCEPTION #19.

MR. SMITH: The defendant doesn't wish to offer any evidence.

MR. SMITH: The defendant moves for judgment as of nonsuit.

THE COURT: Denied. Exception.

EXCEPTION #20.

MR. COOPER: I would like to ask counsel for the defendant if he objects to the Sheriff keeping the exhibits [fol. 89] in the safe tonight?

MR. SMITH: No objection.

THE COURT: Let the record so show.

ARGUMENT TO JURY BEGINS

THE COURT: The defendant objected to the State implying that the defendant did not testify or go upon the stand or present evidence. The Court will instruct the jury as to that phase of the law, and the Court does not recall any reference that the Solicitor made to the defendant's failure to testify, and the Court was present, sitting on the Bench during the entire argument of the Solicitor.

MR. SMITH: Objection.

THE COURT: Overruled. Exception.

EXCEPTION #21.

MR. SMITH: Motion for a mistrial.

THE COURT: Denied. Exception.

EXCEPTION #22.

JURY RETURNS TO COURTROOM.

* * * *

[fol. 116]

STIPULATION OF COUNSEL

IT IS STIPULATED AND AGREED by and between the Solicitor and Counsel for the Defendant that:

1. The composition of the jury, as to race and sex, reduced to categories of the various types of challenges and excuses and of the category of seating on the jury, is as follows:

	White male	White female	Negro male	Total
Challenged for cause as opposed to capital punishment	8	5	3	16
Challenged for cause because of criminal record	0	0	1	1
Challenged for cause as prejudiced against defendant	2	0	0	2
Excused by Court because illiterate	1	0	0	1
Excused by Court because a resident of township where crime allegedly occurred	1	0	0	1
[fol. 117]				
Peremptorily challenged by Solicitor	0	0	2	2
Peremptorily challenged by Defendant	13	3	0	16
Seated on the jury	14	0	0	14
Totals	39	8	6	53

2. The Solicitor, Thomas D. Cooper, during his address to the jury, said substantially the following:

> The State has tried to bring in all the evidence. If there are some questions you want answered, it is not the State's fault that they have not been answered.

THOMAS D. COOPER, Solicitor;

SMITH, MOORE, SMITH, SCHELL & HUNTER
By: Norman B. Smith
Attorneys for Defendant.
SMITH, MOORE, SMITH, SCHELL & HUNTER

* * * *

[fol. 120]

IN THE SUPREME COURT OF NORTH CAROLINA

AFFIDAVIT

For the Defendant

FAYE GOLDBERG, being first duly sworn according to law, deposes and says:

1.

Her name is FAYE GOLDBERG. She lives at 317 Hertford Circle, Decatur, Georgia.

2.

The affiant is an Assistant Professor of Psychology at Morehouse College, 233 Chestnut Street, Southwest, Atlanta, Georgia. She holds a Ed.D. Degree in Human Development from Harvard University. She teaches courses in Development Applied and Abnormal Psychology and Research Methods.

3.

The affiant received an undergraduate degree in Psychology from Temple University and a master's degree from Boston University. (See attached sheet for more complete educational background and related matters including specifications).

4.

Recently, the affiant has completed a long-range study for the purpose of determining what relationship, if any, there is between the willingness of a prospective juror to vote for the death penalty in a capital case, and the predisposition or inclination of that juror to convict rather than acquit the defendant. The methods used in this [fol. 121] study, and the results obtained from the study, are summarized in Exhibit "1", which is attached hereto and made a part hereof, and the contents of which the affiant subscribes to as a part of this affidavit.

5.

In the course of her investigation described in the preceding paragraph, the affiant had occasion to correspond with Dr. Cody Wilson, who taught and researched in the field of Social Psychology at the University of Texas. Dr. Wilson was working on an investigation on the same subject prior to the time the affiant was conducting the above described investigation. Through correspondence with Dr. Wilson, the affiant became familiar with the methods of Dr. Wilson's work, and with the product of his investigation. A copy of the report of his study, describing the methods used and the results established, are incorporated in Exhibit "2" which is attached hereto and made a part hereof, and to the best of the affiant's information and belief, the contents of the said Exhibit "2" are true and complete.

I, Janet Eberstein, a Notary Public of the County of Fulton, and the State of Georgia, do hereby certify that FAYE GOLDBERG, the affiant in the above affidavit, appeared before me this 4th day of May, 1967, and swore to and subscribed the contents of the said affidavit.

/s/ Janet Eberstein
Notary Public

/s/ Faye Goldberg
FAYE GOLDBERG

Notary Public, Georgia, State at Large
My Commission Expires April 13, 1971

[122] ATTACHMENT

EDUCATIONAL BACKGROUND:

AB Psychology Temple University
AM Psychology Boston University
EdD Human Development Harvard University

VOCATIONAL HISTORY:

Assistant Professor of Psychology, Morehouse College
Instructor in Psychiatry, Emory University
Social Science Analyst, National Institutes of Mental Health
Clinical Psychologist, Mass. Mental Health Center
Research Assistant, Harvard University

PROFESSIONAL SOCIETIES:

American Psychological Association
Southeastern Psychological Association
Georgia Psychological Association
Society for the Psychological Study of Social Issues
Society for Research in Child Development

PUBLICATIONS:

Cowan, G. and Goldberg, F. J. Need Achievement as a Function of the Race and Sex of Figures of Selected TAT Cards. Journal of Personality and Social Psychology, 1967, Vol. 5, No. 2, pp. 245-249

[fol. 123]

EXHIBIT "I" TO AFFIDAVIT

ATTITUDE TOWARD THE DEATH PENALTY AND PERFORMANCE AS A JUROR

Dr. Faye Goldberg, Assistant Professor of Psychology
Morehouse College, Atlanta, Ga.

PURPOSE: To determine if persons without conscientious scruples against the death penalty behave differently as jurors from those who do have such scruples. To determine, in addition, if there are race and sex differences in such attitudes.

METHOD: One hundred Negro and 100 white college students were given a questionnaire in which 16 cases were described ranging in severity of the crime committed. All were cases in which the death penalty could have been given. Accompanying the description of the cases was a questionnaire in which the subjects were asked to record their judgments as to guilt or innocence, ranging from guilty of first degree murder to not guilty by reason of insanity. If guilty, the subjects were asked to impose an appropriate sentence which could be death, probation or any intermediate sentence. The instructions to the subjects were as follows:

> Assume you are a member of a jury with the duty to decide the guilt or innocence of the defendant and the sentence in each case based on the summary of the evidence presented. You are to assume that the penalty you select will be inflicted, that is, make no allowance for any modifications such as executive clemency, parole, or pardon. Record your decisions on the accompanying chart.

Following the case summary the subjects were asked to answer Yes or No to the following question: Do you have conscientious scruples against the use of the death penalty?

[fol. 124] RESULTS: 1. People who say they do not have conscientious scruples against the use of the death penalty are:

a. More likely to convict

b. More likely to convict for a more serious crime than for a lesser crime

c. More likely to reject the plea of not guilty by reason of insanity

d. More likely to impose a more severe sentence when they do convict

These subjects are compared with those who say they do have conscientious scruples against the death penalty.

2. Sixty-one percent of the present sample answered that they did have conscientious scruples against the death penalty. Of those who answered the question in the affirmative, 42% contradicted this verbal statement by imposing one or more death sentences in the simulated cases. Of these "contradictory" cases 90% were Negro. This suggests either that the question was misunderstood or that there is a marked disparity between theoretical attitudes and actual behavior. In general there was a marked racial difference in attitudes toward capital punishment; 76% of the Negro subjects said they had conscientious scruples against the death penalty as opposed to 47% of the white subjects.

3. Slightly more women than men opposed the death penalty.

[fol. 125]

EXHIBIT "II" TO AFFIDAVIT

IMPARTIAL JURIES?

Cody Wilson

The Texas Observer, Nov. 17, 1964

Austin

Texas is one of several states that provide for "death qualification" of juries that hear and render decisions in "capital" cases. That is, in order to serve on a Texas jury that hears a case concerned with rape, murder, kidnapping, or armed robbery, a person must believe in capital punishment.

Professor Walter Oberer, formerly of the University of Texas law school, raised the question, in an article in the Nation last spring, whether such practices constitute a denial of fair trial to the defendant on the issue of guilt. He drew two conclusions, that the question had never been squarely presented to any court, and that due process is not a static concept, so that when the issue is presented, the testimony of expert witnesses from psychology may be relevant.

The question Oberer raises is a legal one and can be answered only by the courts. But behind the legal question lies a psychological one: Do people who believe in capital punishment differ from people who have scruples against capital punishment in other psychological characteristics so that a jury composed only of people who believe in capital punishment would be biased against the defendant?

In an effort to answer this question, and thereby perhaps to help the courts answer theirs, a research team of lawyers and psychologists at the University of Texas has gathered information from more than 200 adults, mostly junior and senior college students. Five capital cases were simulated; brief written descriptions were prepared of the facts presented to the jury in each case. Each person was asked to assume, in each of the five cases, that he was a member of the jury and to reach a decision of guilt or innocence. He was asked to indicate the degree of con-

fidence that he had in each of his decisions. He was asked the question the answer to which forms the basis of a "challenge for cause" in a capital case, "Do you have conscientious scruples against the death penalty, or capital punishment for a crime?"

Each person was also asked to agree or disagree with a series of statements, of which these are examples:

"The district attorney's interpretation of the facts in a criminal case is usually more reliable than the defense lawyer's."

"If two witnesses gave conflicting testimony in a criminal case, I would probably believe the witness for the prosecution rather than the witness for the defense."

"If I were a member of a jury, I could never vote 'not guilty' for a man whose defense was insanity."

"The plea of 'not guilty by reason of insanity' is a loophole that allows many criminals to escape punishment."

The number of statements similar to the first two that the subject agreed with was used as a measure of the tendency to be biased in favor of the prosecution. The number of statements similar to the latter two that the subject agreed with was used as a measure of the tendency to be biased against insanity as a defense plea.

Finally, each person was asked to assume the jury had agreed upon a verdict of guilty in each of the simulated cases. Now he was asked to recommend an appropriate punishment. The allowable punishments ranged from suspended sentence to life imprisonment but did not include the death penalty.

The research showed that people who believe in capital punishment differ from those who have scruples against capital punishment in several characteristics related to jury performance:

(1) People who believe in capital punishment are more likely to judge guilty in response to the cases than are people who do not believe in capital punishment;

(2) People who believe in capital punishment are more confident of the correctness of their judgments of guilt and innocence;

(3) People who believe in capital punishment are likely to assess a more severe punishment—even without the death penalty—than are people who have scruples against capital punishment.

(4) People who believe in capital punishment are more likely to be biased in favor of the prosecution and against the defendant;

and (5) People who believe in capital punishment are more likely to be biased against insanity as a defense than are people who have scruples against capital punishment.

If we assume that the observed relationships hold among the adult population at large (and there is no reason for thinking that they would not), then we may conclude that a jury selected by systematically excluding people who have scruples against capital punishment is biased in the direction of being more likely to bring a verdict of guilty, being more confident of this decision of guilty, favoring the prosecution in opposition to the defense, being hostile toward the plea of not guilty by reason of insanity, and assessing a more severe punishment when the death penalty has been excluded from consideration.

If the existence in juries of such systematic biases against the defendant constitutes denial of fair trial, then we are violating one of our most cherished legal traditions with our current jury selection procedures in Texas. The person accused of a capital crime is not getting a fair shake to which we are all entitled.

Dr. Cody Wilson, a social psychologist, is associate professor of educational psychology at the University of Texas.

[fol. 126]

IN THE SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v.

WAYNE DARNELL BUMPERS

OPINION—June 20, 1967

* * * *

[fol. 127] APPEAL by defendant from *Hobgood, J.*, 24 October 1966 Criminal Session, ALAMANCE Superior Court.

The defendant Wayne Darnell Bumpers was charged in a bill of indictment with the rape of one Loretta Briggs Nelson on 31 July 1966. In another bill he was charged with a felonious assault upon her with a .22 caliber rifle, and in a third bill with a felonious assault upon Monty Jones. The three cases were consolidated for trial and were tried at the October 1966 Criminal Session.

The State offered evidence through the testimony of Loretta Nelson, twenty-one years of age, and who is separated from her husband, which is summarized herein. She said that on the night of 31 July 1966, she went for a ride in her 1965 Corvair with Monty Jones, whom she had been dating for some time. They parked on a secluded road and had been there for about ten minutes when the defendant Wayne Bumpers came up to the car and tapped on the window. She rolled the window down about two inches, and he asked her to open the door. Upon her refusal, he put a rifle in the window and told her to get out of the car. When she did, he demanded her favors, which she refused. Bumpers then pointed the gun at Monty Jones, and said "Are you going to give it to me?" She then consented, and he said, "Well, strip." She took her clothes off, laid on the back of the car, and the defendant raped her. He had made Monty get in the back seat and kept the rifle in his [fol. 128] hand pointed toward Monty's head. The defendant hit Loretta in the head with a gun, causing it to bleed. She testified that he had intercourse with her. She put her clothes back on, and the defendant then made the

couple walk down the road. He followed about fifteen feet behind them with his gun. He ordered them to get in the car, with Loretta in the driver's seat, the defendant sitting beside her, and Monty on the back seat. He held a gun on Monty and told Loretta that if she tried to run off the road he would shoot Monty. They came to a little road, and the defendant made them stop the car, get out, and walk down to some bushes. He made them lie down on the ground and told them to stick their hands up in the air. Loretta begged him to let them go, to which Bumpers replied, "I can't do it; you will go to the cops." He said he was going to kill them. Monty then told Bumpers to tie them to a tree, that he didn't have to kill them. At Monty's suggestion, the defendant made Loretta tie Monty to a tree with her belt with his hands behind him, blindfolding and gagging him. The defendant then tied Loretta to a tree, after which he raped her again, having taken off her shorts and pants. After this, the defendant asked Monty where his heart was and then stepped back and shot him. He reloaded the gun and shot Loretta through the left breast, the bullet going all the way through her. The defendant left in Loretta's car. She got her hands free and untied Monty. They walked up the road to a farm house (McPherson's), called for help and told Mr. McPherson that a negro boy had shot them. McPherson called the Sheriff's Department and an ambulance, which took them to Alamance County Hospital.

Loretta said that from the time they first saw the defendant until they got loose was about an hour and a half. "During that time I had an opportunity to hear him talk. I got an opportunity to look at his face, when he opened the car door. The light in the car come on. It was a full moon out there that night otherwise; we could see pretty clear." She identified the defendant as her assailant, said she had never seen him before July 31, but "I know I saw him on July 31. In my own mind I am certain, and nothing could really dissuade me from it."

The testimony of Loretta's companion, Monty Jones, was similar to hers in that he described the events just as she did. He said, also, that he was shot in the middle of the chest, and the bullet lodged in his back. It was taken out three days later. Monty was taken to Alamance Hos-

pital and later transferred to Memorial Hospital in Chapel Hill where he stayed for two weeks. He testified that the doctor sewed up both sides of his stomach, took out his spleen and did something to his lip. He said "I saw the [fol. 129] man who assaulted me on July 31 in the courtroom. (Witness indicates the defendant.) I am indicating the defendant Wayne Darnell Bumpers . . . . I seen my attacker in the car. I knew what he looked like. I seen him in the car. I only knew what he looked like."

The State offered evidence to corroborate the testimony of these two witnesses relating to what they had told them and also as to the identification of the defendant as the assailant.

Dr. William M. Crutchfield testified that he was an intern at Memorial Hospital in Chapel Hill, that he treated Monty Jones and described the latter's injury, that Dr. Hartzog performed an exploratory operation with Dr. Crutchfield assisting. He said "The missile track indeed went through the anterior or front portion of the diaphragm, went through the left side of the liver, through the lower part of the stomach and lacerated or injured the spleen . . . and you could feel the bullet underneath the skin on the left side of the chest . . . the spleen had to be removed because it was bleeding . . . the bullet was not removed at this time for many reasons, one being the area had a lot of air in the skin . . . Six days after he was admitted to the hospital, . . . we put this (anesthetic) in the skin, made a very small incision, and the bullet popped right out." He testified that the next day he gave the bullet to Mr. Minter, agent of the S.B.I.

J. M. Minter testified that he is a member of the State Bureau of Investigation, that he went to the place which was described as the scene in question where he found a .22 cartridge. He also saw some dress material, or cotton, one piece tied three or four feet above the ground with some parts lying on the ground and some strands of thread from which cloth had been removed. He testified that on August 2 he went to the home of Mrs. Hattie Leath, grandmother of the defendant who lived with her, where he found a .22 caliber, single-shot rifle which was taken to the S.B.I. laboratory in Raleigh and turned over to Agent John Boyd. He identified a .22 caliber bullet

that he received from Dr. William Crutchfield at Chapel Hill, and it was also taken to the S.B.I. laboratory in Raleigh and given to Agent John Boyd who further identified a .22 spent cartridge which was found at the scene of the shooting in the area where the cloth was tied on the tree. This was also taken to Raleigh and turned over to Agent John Boyd.

John Boyd testified that he has been employed with the State Bureau of Investigation for fifteen years and is the Special Agent in charge of the Firearms Section of the Crime Laboratory. His specialty is firearms identification and ballistics work. The Court held that he was an expert in that field. He identified the cartridge case and [fol. 130] the two bullets received from Mr. Minter as having been fired from the rifle which had previously been identified as being the one found in the home of Mrs. Hattie Leath.

Dr. Allen D. Tate, Jr., whom the Court held to be a medical expert, testified that he made a pelvic examination of Loretta Nelson on the evening of July 31, made a slide, which showed the presence of sperm. He said he was not able to tell how long it had been there but gave it as his opinion that she had engaged in sexual intercourse within the past twenty-four hours prior to the time he saw her. He said she had a contusion and a laceration of her forehead, which was bleeding slightly and required three stitches.

The defendant moved for judgment as of nonsuit at the close of the plaintiff's evidence, which was denied. The defendant offered no evidence and again moved for judgment of nonsuit, which was denied.

The jury returned verdicts of guilty as charged in the bills of indictment (for felonious assault) and a verdict of guilty of rape with the recommendation of life imprisonment. The Court thereupon pronounced sentences of ten years imprisonment, to run consecutively, in each of the felonious assault cases, and that he "be imprisoned in the State Prison for the remainder of his natural life, to be assigned to work as by law provided," which was to begin at the expiration of the two ten-year sentences in the felonious assault cases.

From the judgments, the defendant appealed.

Smith, Moore, Smith, Schell & Hunter by Norman B. Smith, Attorneys for the defendant. Of Counsel: Lee, High, Taylor & Dansby by Herman L. Taylor.

T. W. Bruton, Attorney General; Harry W. McGalliard, Deputy Attorney General, for the State.

PLESS, J. The defendant makes a very interesting argument in his brief to the effect that it was error for the Court to excuse prospective jurors on the ground that such persons did not believe in capital punishment. He recognies that this position has been adversely determined in the very recent case of *State* v. *Childs*, 269 N.C. 307, 152 S.E. 2d 453, but requests that the Court reconsider and reverse the ruling therein made. However, this decision was adopted by a unanimous Court within the past few weeks, and the reasoning of it is sound and convincing. The following excerpts, some of which are quotations from other courts, are well chosen and concisely stated in the opinion of Chief Justice Parker:

[fol. 131] "It is a general rule that the State in the trial of crimes punishable by death has the right to an impartial jury, and in order to secure it, has the right to challenge for cause any prospective juror who is shown to entertain beliefs regarding capital punishment which would be calculated to prevent him from joining in any verdict carrying the death penalty.

"' . . . What (the defendant) is really asserting is the right to have on the jury some who may be prejudiced in his favor—*i. e.*, some who are opposed to one possible penalty with which he is faced. We think he has no such constitutional right. His right is to absolute impartiality.'

"'It will readily be seen that this "balanced" jury, which the defendant envisages, is in reality a "partisan jury"; if, as he urges, it may include jurors with bias or scruples against capital punishment it must—if it is to have "balance"—include also those with bias in favor of the death penalty as the punishment for murder. It is settled that under the Statute the verdict must be unanimous both as to guilt and as to

punishment. As a result, . . . any juror "can hang the jury if he cannot have his way" as to the sentence which he deems appropriate. These considerations lead to the conclusion that trials before "balanced juries" even on unanimous findings of guilt, would frequently result in disagreements. And disagreements on successive trials would result in practical immunity from murder. We cannot believe that the Statute was intended to have such a tendency.'

"'Upon the theory that conscientious scruples against infliction of the death penalty under any circumstances, or equivalent beliefs, equally disqualify a jury for cause in a prosecution for a capital crime, whether the law prescribes the single punishment of death upon conviction, or invests the jury, upon conviction, with a discretionary power to assess death or life imprisonment according to the evidence and circumstances, the rule has become generally accepted that where the jury is vested with such discretion the state may challenge for such cause because it is entitled to the maximum penalty if the proof shall justify it, and to contend throughout the trial and finally to the jury that the character of the crime justifies it.'"

Fifty-three prospective jurors were examined, sixteen of whom stated that they were opposed to capital punishment, and they were thereupon excused from service. If the argument of the defendant is to be carried to extremes, it would mean that if the State had exhausted its peremptory challenges when these sixteen jurors were examined that the entire jury would have been opposed to [fol. 132] capital punishment. It is well-known that in many horrible cases the defendants are anxious to avoid the possibility of a death sentence and will offer, and in fact plead for permission, to enter a plea of guilty which will mean the imposition of a life sentence. However, the Solicitor in many of these cases feels that the public interest requires that a jury, rather than he, should take the responsibility of saving the defendant from the death penalty, if it is to be done, and therefore puts the defendant on trial in which the death penalty is sought.

Every litigant, whether it be the State or the defendant, in a criminal case or the parties in a civil case, is entitled to an impartial jury. Where a juror states in advance that under no circumstances would he accept the contentions and positions of a party, he is not impartial to that party but, as a corollary, must necessarily be partial to the adversary.

If a prospective juror stated that under no conditions would he acquit a defendant or that no evidence could cause him to convict the defendant, it should not be claimed that he was an impartial juror. In a case in which the prosecution was relying exclusively upon circumstantial evidence, no court would require the State to accept a juror who stated that under no conditions would he convict a defendant upon circumstantial evidence. Where a venireman states that he has read or heard so much about a case that he had formed the opinion that the defendant was guilty, and he would not under any conditions acquit him, no court would permit such person to serve on the jury; and we can conceive of no reasonable person who would argue that he should. This, however, is merely the corollary of the defendant's position in this case.

The result in this case refutes the argument of the defendant. A jury wholly composed of persons who believe in capital punishment have still not imposed it upon the defendant in a case where the facts overwhelmingly would sustain the death penalty.

The defendant complains of the search of his grandmother's house which resulted in finding a rifle that has been identified as the one which fired the shots into the bodies of Mrs. Nelson and Monty Jones. But it must be remembered (1) that his premises were not searched—they were his grandmother's; (2) *his* rifle was not taken—it was his grandmother's; (3) *she* gave permission for the search and has not yet complained of it. Since the Solicitor announced that he was not relying upon the search warrant but upon permission given by the owner of the premises for its search, the question arises as to whether her consent was voluntarily given. While there are decisions that the presence of officers and the announcement

[fol. 133] that they wish to search premises constitutes a condition in which coercion and intimidation may be present, they are not applicable here.

The defendant sought an order of the Court requiring the State to return the rifle and to suppress evidence regarding it. In support of the motion they offered the affidavit of Mrs. Hattie Leath in which she said: "On Tuesday, August 2, 1966, at about 2:00 P.M., four white men drove up to her house in two cars. She knew these men to be officers of the Alamance County Sheriff's Department, although they were not in uniform . . . One of the deputies came up on the porch of her house and walked up to the front screened door. She was standing immediately inside the door. The deputy said he had a notice or a warrant or something like that, for searching her house. He did not appear to have any paper in his hand, and he did not read anything to her. After hearing this, she did not stop to think about whether the officers had a right to search her house. She simply answered the officer right away by saying, 'Go ahead,' as she opened the door and stepped out onto the porch. The officers began at once to search the house."

During the trial the State offered the rifle which was found in the house, and upon objection to its admission, the Court excused the jury, and Mrs. Leath testified in person. Some of her statements are quoted as follows (the underscoring is ours): "I own my own house; it belongs to me . . . The defendant Wayne Darnell Bumpers was living with me on that date . . . He has been living with me at this place all of his life . . . Sheriff Stockard came out to my home . . . Four of them came. I was busy about my work, and they walked up and said, 'I have a search warrant to search your house,' and I walked out and *told them to come on in*. . . . I just told him to come on in and go ahead and search, and I went on about my work. I wasn't concerned what he was about. I was just satisfied . . . I told Mr. Stockard to go ahead and look all over the house. I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything . . . I let them search, and it

was *all my own free will.* Nobody forced me at all." She also said, "I did have a .22-caliber Remington, single-shot rifle at my house on July 31. Most of the time it stayed inside the wardrobe and then behind the door, out from the living room. This is my rifle . . . I have owned it since my husband bought it."

It is to be noted that the rifle was not found in the defendant's private room, nor in any part of the house assigned to him, but "inside the wardrobe, or behind the door."

[fol. 134] Following Mrs. Leath's testimony, the following entry was made by the Court:

> "THE COURT: The Court finds that from the evidence of Mrs. Hattie Leath that it is of a clear and convincing nature that she, the said Mrs. Hattie Leath, voluntarily consented to the search of her premises, as is more particularly set forth in her evidence, and that that consent was specifically given and is not the result of coercion from the officers. MOTION DENIED for suppression of the evidence with reference to the .22-caliber rifle, marked State's Exhibit No. 2."

We know no better way to establish that one's actions were voluntary than by the statement and attitude of the person concerned. No interpretation can be placed upon Mrs. Leath's testimony that would sustain any claim of coercion or pressure or intimidation. The defendant cites *Mapp* v. *Ohio*, 367 U.S. 643 (1961), and we have also had called to our attention the very recent case of *Maryland Penitentiary* v. *Hayden*, decided by the U. S. Supreme Court 29 May 1967. Upon consideration of them, we find them inapplicable here. Rather, the terse statement of Denny, J., later C.J., speaking for the Court in *State* v. *Moore*, 240 N.C. 749, 83 S.E. 2d 912, is controlling:

> "The first question posed is whether a search warrant was required to search the premises of the defendant if he consented to the search. The answer is no. It is generally held that the owner or occupant of premises, or the one in charge thereof, may consent to a search of such premises and such consent

> will render competent evidence thus obtained. Consent to the search dispenses with the necessity of a search warrant altogether. . . . The second question is whether the defendant consented for the officers to search his premises . . . The Court found as a fact that the defendant, at the request of the officers, voluntarily gave them permission to search his premises . . . the ruling of a trial judge on a *voir dire*, as to the competency or incompetency of evidence [adduced upon the search], will not be disturbed if supported by any competent evidence."

It cannot be successfully argued that when the owner of premises voluntarily gives consent for search that all of the other occupants of the house are required to agree. "One cannot complain of an illegal search and seizure of premises or property which he does not own . . . and one may not object to an illegal or unreasonable search of the property of another, if his own privacy is not unlawfully [fol. 135] invaded." 79 C.J.S. 811, *et sc*. Had the rifle-user concealed the weapon under a stack of hay in a neighbor's barn, his permission need not be granted before the barn could be searched.

In *Commonwealth* v. *Tucker*, 189 Mass. 459, 76 N.E. 127, the officers searched the home where the defendant resided after his mother had invited them to make any search they desired. They found evidence that incriminated the defendant. He contended that the articles taken in the search were not admissible against him. The Court said, "It is argued that the defendant did not consent and that his mother could not consent for him. But that is immaterial. The officers did not act under the warrant but under the invitation of the mother."

The object of government is to protect the rights of the public—the people. Otherwise, there is no reason for it—and the individual would have to protect his home, his possessions, and his family. In protecting the public, we must always remember that innocent persons may be unjustly accused, and their rights, too, must be safeguarded. But we must not become too zealous in protecting the accused that we overlook and ignore those who have been robbed, raped and murdered.

The United States and North Carolina Constitutions wisely and properly inhibit unreasonable and unwarranted searches. These provisions are not intended to shield the criminal—they are to protect the innocent citizen in his privacy, and to make every man's home his castle. They should not give to a criminal an impenetrable fortress in which he can barricade himself against all proof of guilt.

Here, a young woman is twice raped, and then she and her companion are told that they must die, lest they reveal the identity of the rapist and murderer. One bullet from his cruel rifle penetrates the entire body of one. The other is lodged near the heart of the other. Is it unreasonable and unwarranted that the officers, charged with the duty of apprehending the heartless and inhuman perpetrator, should use every energy in locating the weapon use, and apprehending its user? An overwhelming majority of the public would immediately answer that *any* means would be justified. But the officers, recognizing the restraints under which they must work (some might call them unreasonable and unrealistic), make a search of the premises in which they have ample evidence that the accused lived—and do so with the voluntary permission of the person who owns and controls them. Their search might reveal nothing, and to some extent absolve the suspect. The fact that it did reveal the presence of the guilty weapon, to which the already identified assailant had access, justifies the search. Recurring to the funda- [fol. 136] mental that the object is not to protect criminals and to provide them with the right to perpetrate such a horrible crime without fear of apprehension, it is clear that his rights have not been violated. Rather, his wrongs have ~~been detected~~.

For the reasons above stated, we are of the opinion that the evidence with regard to the rifle was competent, and the exceptions relating thereto are overruled.

The defendant also excepts to the following argument alleged to have been made by the Solicitor in his address to the jury: "The State has tried to bring in all the evidence. If there are some questions you want answered, it is not the State's fault that they have not been answered." However, no objection was made at the time, and it is

thus waived. *State* v. *Costner*, 127 N.C. 566, 37 S.E. 326; *State* v. *Jenks*, 184 N.C. 660, 113 S.E. 783; *State* v. *Bryant*, 236 N.C. 745, 73 S.E. 2d 791; *State* v. *Lewis*, 93 N.C. 581; *State* v. *Steele*, 190 N.C. 506, 130 S.E. 308.

The record is not explicit, but apparently, following the argument of the Solicitor, the defendant made an exception to parts of it at which time the Court made the following entry:

> "THE COURT: The defendant objected to the State implying that the defendant did not testify or go upon the stand or present evidence. The Court will instruct the jury as to that phase of the law, and the Court does not recall any reference that the Solicitor made to the defendant's failure to testify, and the Court was present, sitting on the Bench during the entire argument of the Solicitor."

The Court fulfilled the above, and fully protected the defendant's rights (*State* v. *Lewis*, 256 N.C. 430, 124 S.E. 2d 115) when he charged the jury as follows:

> "Now, members of the jury, in this case the defendant has not testified in his own defense, neither has he offered any evidence in his own defense in any of the three cases for which he stands for trial. The Court instructs you that the defendant may or may not testify in own his behalf as he may see fit and his failure to testify shall not create any presumption against him whatsoever. Therefore, the Court further instructs you with reference to the same that there is no requirement upon the defendant to testify, there is no requirement that he give evidence in the case because the requirement is that the State proves the defendant guilty beyond a reasonable doubt as the Court has defined that term of any of the charges against him or any lesser degrees of those charges.
>
> [fol. 137] "Therefore, please bear in mind the instructions that the defendant's failure to testify shall not create any presumption against him whatsoever and certainly no presumption of guilt."

There can be no doubt that an atrocious crime was committed upon the young lady here involved and that her assailant intended to take two lives to avoid identification. There can be little doubt of the good faith of Loretta Nelson in identifying the defendant. It is only human nature that she would insist that the guilty person, and not someone else, be punished. That is also true of her companion. The evidence of these two alone would be amply sufficient to sustain the verdict of the jury and the judgment of the Court. The evidence that the rifle found in the home where the defendant lived was the one that fired the shots into the bodies of the State's witnesses merely "makes assurance doubly sure" that the defendant is guilty. We hold that his rights have been fully protected, and that in his trial there was

No error.

[fol. 138]

SUPREME COURT OF THE UNITED STATES

No. 678 Misc., October Term, 1967

WAYNE DARNELL BUMPER, PETITIONER

v.

NORTH CAROLINA

On petition for writ of Certiorari to the Supreme Court of the State of North Carolina.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—January 15, 1968

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1016 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 289354 583

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1016

WAYNE DARNELL BUMPER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITIONER'S BRIEF

NORMAN B. SMITH
Counsel for Petitioner

SMITH, MOORE, SMITH, SCHELL & HUNTER,
700 Jefferson Standard Building,
Drawer G,
Greensboro, North Carolina 27402
Telephone No. 273-8264

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PETITIONER'S BRIEF

Opinion Below

The opinion of the Supreme Court of the State of North Carolina is reported at 270 N.C. 521, 155 S.E. 2d 173.

Jurisdiction

The judgment of the Supreme Court of North Carolina was made and entered on July 24, 1967, and a copy thereof is set out in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented

1. Whether it is a denial of the defendant's rights under the Fourteenth and Sixth Amendments to the Constitution of the United States in a state proceeding, when a state court denies a timely request by the defendant to disallow the prosecuting attorney's challenges of prospective jurors for cause on the ground that they are opposed to capital punishment, for the reason that allowing such challenges deprives the defendant of a jury trial by his peers, that is, by representatives of a fair cross-section of the community.

2. Whether it is a denial of the defendant's rights under the Fourteenth and Fourth Amendments to the Constitution of the United States in a state proceeding, for police officers to produce a piece of paper, which they claim to be a valid search warrant, to the head of the household in which the defendant resides, and thereby gain entry to the house and gain possession of a rifle, and for the state court to permit this rifle to be used in evidence against the defendant, based on the stipulation of the state's prosecuting officer that the state's theory is there was a voluntary consent and the state will not rely on the piece of paper the police officers represented to be a warrant.

Constitutional Provisions Involved

Constitution of the United States:

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof,

are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statement of the Case

The petitioner, Wayne Darnell Bumper, was indicted on a capital bill for rape and on two bills for assault with a deadly weapon with intent to kill, inflicting serious injuries, not resulting in death. The three bills of indictment were consolidated (App. 2-5, 12) for trial. The cases were tried in the Superior Court of Alamance County, North Carolina, on October 24-27, 1966.

The petitioner defendant presented a pretrial motion to the Court for the return of seized property and its suppression as evidence, consisting of several items of clothing and one .22 caliber Remington rifle. (App. 7-8) The Court allowed the motion insofar as it pertained to the articles of clothing, but the Court withheld a ruling on the motion with respect to the .22 caliber Remington rifle.

The defendant entered a plea of not guilty to each of the charges.

The Court proceeded with the selection of the jury. After the Solicitor made his first challenge for cause on the ground of opposition to capital punishment, the attorney for the defendant made a motion for the disallowance of challenges for cause grounded on opposition to capital punishment. This motion was treated as a continuing motion as to all such challenges and was denied. (App. 13-21) A total of fifty-three prospective jurors were examined before a jury of twelve and two alternates were selected. From among the prospective jurors, sixteen were excused by the Court upon challenges for cause by the State on the ground that the prospective jurors opposed capital punish-

ment. The defendant is a Negro male. The trial jury consisted entirely of white males. Of the eight white females who were examined, five were challenged and excused for cause as being opposed to capital punishment. Of the six Negro males examined, three were examined and excused for cause as opposed to capital punishment, two were peremptorily challenged by the Solicitor, and one was excused by the Court upon motion of the Solicitor because of a criminal record. (App. 72)

The principal witnesses for the state were Mrs. Loretta Nelson and Monty Jones, the alleged victims of the assaults for which the defendant was tried. They testified that on the evening of Sunday, July 31, 1966, they went for a ride in Mrs. Nelson's automobile, and, after it had become completely dark, they parked on a dirt road near a lake. (App. 23, 24) A man carrying a rifle came up to the car and forced the couple to get out. He asked them for their money, and they gave him what money they had, which was about $3.00. (App. 23-24, 35)

The man, a Negro, told Mrs. Nelson that he wanted to have sexual intercourse with a white girl. When the gun was pointed to her companion, Monty Jones, she consented to have intercourse. They testified that while the man was having intercourse with Mrs. Nelson he kept the gun in his hand, covering Monty Jones who was lying down in the back seat of the car. (App. 24, 35-36)

The witnesses stated that their attacker then got into the car with them and instructed Mrs. Nelson to drive to the highway and from there into another small dirt road some distance away. Here they got out of the car again. The man told the witnesses that he was going to have to

kill them because they would go to the police. Monty Jones told the attacker to tie them to trees with some belts and a dress which were in the car, blindfold them, and leave with the car. The attacker agreed to do this, and at his direction Mrs. Nelson tied Monty Jones to a tree. The attacker then tied Mrs. Nelson to another tree, removed her clothing and had intercourse with her again while she was tied to the tree. The attacker thereafter shot both Monty Jones and Mrs. Nelson in the chest and left with the car. The witnesses stated that they managed to free themselves, get to a farmhouse, and summon help. (App. 25-27, 36-38) At the time of the trial, both had recovered from their wounds. (App. 30, 38)

The witnesses Loretta Nelson and Monty Jones both testified that it was the defendant Wayne Darnell Bumper who had attacked them. They stated that although it was dark at all times while he was with them, the moon provided enough light for them to recognize him. (App. 29-30, 39-40)

The name of the petitioner Wayne Darnell Bumper was released on and after August 3, 1966, by the Sheriff's Department as the person arrested and charged with the attacks on Loretta Nelson and Monty Jones, and this information was printed in newspapers in Graham and Burlington, North Carolina, and elsewhere. (R. 10-15, App. 62) Several days later Monty Jones and Loretta Nelson were brought to the Alamance County jail and invited to look at a lineup. The lineup consisted of ten Negro males and included the defendant Wayne Darnell Bumper. First Monty Jones and Loretta Nelson were conducted through the lineup separately. Both identified the person carrying

card number 6 as their attacker. The defendant was carrying card number 7. (App. 33, 41, 58). Mrs. Nelson and Monty Jones were then conducted through the lineup together. All persons in the lineup, including the defendant, were required to state their names. The defendant was carrying card number 2. Both witnesses identified the man who was carrying card number 2 as the attacker. (App. 33, 41, 58-59)

The state sought to introduce into evidence a .22 caliber rifle taken by the sheriff's deputies and a State Bureau of Investigation officer from the home where the defendant resided with his grandmother, Mrs. Hattie Leath. In the absence of the jury, the Court heard testimony bearing on the defendant's motion to suppress this evidence. The Solicitor stated for the record that the state was not relying upon any search warrant, but was relying solely upon the voluntary consent to search and seizure by Mrs. Hattie Leath, the person in possession of the premises searched. (App. 43)

Mrs. Leath stated in her affidavit substantially as follows: She is a 66-year-old Negro widow. She lives at the end of a one-mile dirt road in Alamance County. She lives with her son and several infant grandchildren. The defendant is her grandson, and he lived with her before his arrest. On August 2, 1966, four white men whom she knew to be officers of the Sheriff's Department, drove up to her house. Her son was not in or near the house at the time. One of the deputies came upon the porch of the house and walked up to the front screen door. She was standing immediately inside the door. The deputy said that he had a notice or a warrant or something like that for searching the house. After hearing this, Mrs. Leath did not stop to

think whether the officers had the right to search the house. She simply answered the officers right away by saying, "Go ahead," as she opened the door and stepped out onto the porch. The officers began at once to search the house. (App. 7-8)

Mrs. Leath identified the Remington .22 caliber rifle which was taken from the house. On cross examination by the Solicitor, Mrs. Leath testified as follows:

> Four of them come in and I was busy about my work and they walked into the house and one of them walked up and said, "I have a search warrant to search your house," and I walked out and told them to come on in. . . .
>
> Q. What do you say that he said to you?
>
> A. Well, he just come on in and said he had a warrant to search the house, and he didn't read it to me or nothing, and so I just told him to come on in and go ahead.
>
> Q. Go ahead and search?
>
> A. Yes, I did, and I went on about my work. I wasn't concerned what he was about. I was just satisfied.
>
> Q. He told you he had a search warrant?
>
> A. He just told me he had one, but he didn't read it to me. . . .
>
> Q. You had no objection to them making a search of your house, did you?
>
> A. No, I didn't. . . .
>
> Q. So you let them search and it was all your own free will?
>
> A. Yes, sir. . . .

[Mrs. Leath said that she told the Sheriff to look all over the house, that she was willing to let them look anywhere in the house. She said that she was not threatened with anything and not promised any money by the officers. On redirect examination Mrs. Leath testified:]

Q. You looked upon them as officers of the law and they had a right to go around and go into people's homes, is that what you thought?

A. He said he was the law and had a search warrant to search the house, why I thought he could go ahead.

Q. You believed he had a search warrant?

A. That is what I believed about it. I took him at his word.

Q. You thought the search would be valid and there would be no reason to look at it, is that right?

A. That is right. That is what I thought about it. . . .

Q. At this time you knew that your grandson had been charged with the crime?

A. No, I didn't.

Q. You didn't?

A. No, nobody told me anything, they didn't tell me anything, just picked it up like that, they didn't tell me anything about my grandson. (App. 46-48, restored to question and answer form)

The court overruled the defendant's motion to suppress the evidence, finding from the clear and convincing evidence, that Mrs. Hattie Leath voluntarily consented to the search of her premises. (App. 48)

An agent for the State Bureau of Investigation testified for the state as an expert witness in the field of firearms identification and ballistics. He stated that the .22 caliber Remington rifle, which had been seized from the home where the defendant resided, was, in his opinion, the gun which fired two .22 caliber cartridge cases found at the place where Loretta Nelson and Monty Jones had been tied up, and which fired a .22 caliber spent bullet which was taken from the body of Monty Jones. (App. 63-64)

The Sheriff testified that some unidentified fingerprints were found in Mrs. Nelson's car, but that the defendant's fingerprints were not found there. (App. 69-70)

The defendant did not offer any evidence.

Following the charge by the Court, the jury deliberated and returned with a verdict of guilty as charged in the assault cases and guilty as charged with recommendation of life imprisonment in the rape case. The Court sentenced the defendant to two consecutive 10-year terms of imprisonment for the assault convictions, and a sentence of life imprisonment for rape, to commence at the expiration of the second 10-year sentence. (App. 10-12)

The petitioner defendant appealed the conviction to the Supreme Court of North Carolina. There the defendant introduced an affidavit of Dr. Faye Goldberg, of Decatur, Georgia, a professor of psychology at Morehouse College, in support of his argument that his trial was rendered unfair by the Court's permitting the Solicitor to challenge for cause all the prospective jurors who were opposed to capital punishment. Dr. Goldberg's affidavit reported the results of a study which she had made on the relationship between the willingness of a prospective juror to vote for

the death penalty and the predisposition of such a juror to convict rather than acquit. She stated that among the results of her study was the finding that people who say they do not have conscientious scruples against the use of the death penalty are more likely to convict than acquit. (App. 73-77) In her affidavit Dr. Goldberg also described some similar research conducted by Dr. Cody Wilson, a teacher of social psychology at the University of Texas, with which she had become familiar in the course of her own work. Dr. Cody Wilson found that people who believe in capital punishment are more likely to judge guilty than are people who do not believe in capital punishment, and people who believe in capital punishment are more likely to be biased in favor of the prosecution and against the defendant. (App. 74, 78-80)

The Supreme Court of North Carolina filed its opinion affirming the conviction of the petitioner defendant. The Court held, with respect to the questions which are raised by this proceeding on writ of certiorari, that (1) it was not error for the Court to excuse prospective jurors on the ground that such persons did not believe in capital punishment, and (2) a rifle which was seized in the house where the defendant lived was taken with the voluntary consent of Mrs. Hattie Leath, and therefore its admission as evidence was not error. (App. 81-93)

The petitioner petitioned the Supreme Court of the United States for a writ of certiorari to review the judgment of the Supreme Court of North Carolina. The petition was granted. (App. 94)

SUMMARY OF THE ARGUMENT

I.

THE STATE OF NORTH CAROLINA DENIED THE PETITIONER EQUAL PROTECTION OF THE LAWS AND DUE PROCESS OF LAW AND THE RIGHT OF TRIAL BY IMPARTIAL JURY WHEN PROSPECTIVE JURORS WERE EXCUSED AT HIS TRIAL FOR CONSCIENTIOUS SCRUPLES AGAINST CAPITAL PUNISHMENT.

A. Juries Must Be Composed of a Representative Cross-Section of the Community.

The petitioner was tried and found guilty by a jury from whose ranks had been removed all those who had conscientious scruples against the death penalty. The jury is the collective conscience of the community; the role of the jury is central to the democratic process. The courts have consistently stricken down jury service exclusions based on race, religion, sex, and economic class. There is a constitutional right to a jury drawn from a group which represents a cross-section of the community.

B. Death-Qualified Juries Are in Fact Conviction-Prone Juries.

In the present case, 30% of the prospective jurors were excused upon the state's challenge for cause on the ground of conscientious scruples against the death penalty. The experience of the criminal bar is that jurors who favor capital punishment, as compared to jurors who oppose capital punishment, are less likely to indulge in the presumption of innocence of the defendant, are more likely

to believe the state's evidence than that of the defendant, and are more likely to convict than acquit. This observation is supported by the theory of the authoritarian personality. Persons who favor capital punishment would appear to be politically rightist authoritarians, who are conservative, and at the same time moralistic, highly punitive, and distrustful. Psychological studies bear out this hypothesis. Compared with jurors who have conscientious scruples against the death penalty, jurors without death scruples have been demonstrated to be generally more conservative, and particularly more likely to render a verdict of conviction, and more likely to be biased in favor of the prosecution and against the defendant. A national poll shows more Americans against the death penalty than in favor of it; necessarily a large percentage of the persons who register opposition to the death penalty would be excused for cause from a capital jury. Consequently, the practice of allowing challenges of jurors for cause in capital cases limits jury duty to an element of the community which is predisposed to convict and prosecution-oriented, eliminates from the jury a large segment of the population that would be more favorable to the defendant on the issue of guilt or innocence, and effectively deprives the defendant of trial by a jury composed of a cross-section of the community.

C. Exclusion of Jurors With Death Scruples Has No Common Law Basis.

There seems to have been no common law challenge for cause of persons with conscientious scruples against the death penalty. The majority of American courts hold the state does have a right to such a challenge. In the past when the death penalty was mandatory for almost all

capital crimes, there was some justification for this position, because jurors who could not accept the death penalty would be compelled to vote for acquittal. At present this reasoning does not apply, because the jury is vested with the discretion to return a verdict of life imprisonment in a capital case.

D. The State Is Without Legitimate Interest in Demanding Death-Qualified Juries.

The only right the state can presently assert for challenging jurors with death scruples is the right of the state to seek the death penalty. This right is without foundation in practicality in the light of the decreasing number of executions, growing popular dissatisfaction with the death penalty, and increasing number of states which have abolished capital punishment. The experience in Iowa, where challenges for cause on the ground of conscientious scruples against the death penalty are not permitted, indicates that the lack of a challenge for cause of jurors with death scruples will not of itself bring an end to the death penalty. There is no evidence to show that an unusual number of hung juries would result from abolishing the challenge for cause of jurors with death scruples.

E. Removal of Death-Scrupled Jurors for Cause Is a Denial of Due Process, Equal Protection, and the Right to Trial by Impartial Jury.

Allowing the challenges for cause of jurors with scruples against the death penalty in this case denied the petitioner equal protection of the laws, in that exclusion from jury service of the class of persons with death scruples was a classification injurious to the petitioner, which was not

grounded upon any legitimate state interest. The practice of excusing for cause jurors with death scruples denied the petitioner due process of the law; because it infected the integrity of the fact-finding process. Exclusion of jurors with scruples against the death penalty also denied the petitioner a trial by an impartial jury, in violation of the Sixth and Fourteenth Amendments.

II.

THE PETITIONER'S RIGHTS UNDER THE FOURTEENTH AND FOURTH AMENDMENTS WERE VIOLATED BY THE STATE OF NORTH CAROLINA BY THE INTRODUCTION OF A RIFLE AT HIS TRIAL, ON THE GROUND THAT IT HAD BEEN TAKEN BY VOLUNTARY CONSENT FROM THE PETITIONER'S DWELLING, WHEN THE POLICE OFFICERS HAD GAINED ENTRY TO THE HOUSE BY PRODUCING A PIECE OF PAPER THEY CLAIMED TO BE A SEARCH WARRANT.

A. There Was No Voluntary Consent to the Search of the Petitioner's House.

In applying the search and seizure exclusionary rule, the states must be governed by the fundamental criteria of the Fourth Amendment. The growing use by the police of consensual searches instead of searches with search warrants represents an erosion of Fourth Amendment rights. When officers come without warrants and demand to search a home under government authority, these are circumstances of implied coercion, and articles taken from the home ordinarily must be suppressed on Fourth Amendment grounds. In the present case the search was made on the strength of a paper which the officers represented

to be a search warrant, and they were admitted to the house by petitioner's grandmother under the assumption that they possessed a valid search warrant and had a right to enter. There was no indication that the petitioner's grandmother would have admitted the officers had they come without a warrant. Yet the state abandoned the "warrant" at the time of the trial, and relied instead on the theory that the petitioner's grandmother voluntarily consented to the search. Under established Fourth Amendment tests, there was no voluntary consent to the search by the petitioner's grandmother in view of the circumstances of her age, sex, and race, the physical isolation of the house, the absence of other friendly adults, and the number of officers and the suddenness of their intrusion. In any event, if consent was secured, it was consent to a search with a warrant, not to a warrantless search. The Supreme Court of North Carolina was influenced to some extent in its decision by the unacceptable supposition that so long as inculpating evidence is found, the means of a search are justified by its end.

B. The State Failed to Secure an Intelligent Waiver of the Right to Be Free From Warrantless Searches.

For a consensual search to be effective, there must be an understanding and intentional waiver of the constitutional protection against unreasonable searches. It is established that the constitutional right to assistance of counsel and privilege against self-incrimination cannot be waived in the absence of proof that the subject was fully informed of his constitutional rights, and then freely and understandingly chose to relinquish them. The same principle should apply to waiver of Fourth Amendment rights. No such intelligent waiver was obtained in the present case.

C. The Petitioner Has Standing to Complain of the Search of His Premises.

The petitioner has standing to complain of the search of his premises, because, as a member of the household, he was legitimately connected with the premises where the search took place.

ARGUMENT

I.

The State of North Carolina Denied the Petitioner Equal Protection of the Laws and Due Process of Law and the Right of Trial by Impartial Jury When Prospective Jurors Were Excused at His Trial for Conscientious Scruples Against Capital Punishment.

A. Juries Must Be Composed of a Representative Cross-Section of the Community.

The petitioner was tried and found guilty by a jury from whose ranks had been removed all those who had conscientious scruples against the death penalty. The contention of the petitioner is that the challenge of jurors for cause on the ground that they have conscientious scruples against the death penalty deprives a defendant of an impartial jury, and assures the state of a jury whose predisposition is to convict.

The Magna Carta (Cap. XXIX) held that no man will be passed upon or condemned except "by lawful Judgment of his Peers." By the time the common law was imported to the American continent, this right had become the right of a trial by jury as we know it today. 4 Blackstone, *Commentaries* *349. The denial and abridgement of trial

by jury was one of the complaints which inspired the American Revolution.[1]

The Federal Constitution and the constitution of every state of the United States contains a guarantee of trial by jury in criminal cases.[2]

The jury is regarded as the collective conscience of the community. The deliberations and decision-making of a jury are the essence of the democratic process. By serving and being available to serve on juries, the citizens acquire a sense of personal responsibility for fair enforcement of just laws.

An understood and accepted function of the jury system is to blunt the force of laws that are harsh, outmoded, and arbitrary. At times in our history juries have effectively nullified unpopular laws, for example, the colonial taxation and trade regulation laws, and more recently the national prohibition laws. See Powell, *Jury Trial of Crimes,* 23 Wash. & Lee L. Rev. 1, 3, 6 (1966). Today we do not witness such widespread jury intransigence; this condition may be viewed as an indication of general public acceptability of present law.[3]

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[1] "As manifested by the Declaration of Independence, the denial of trial by jury and its subversion by various contrivances was one of the principal complaints against the English Crown. Trial by a jury of laymen and no less was regarded as the birthright of free men." *Green* v. *United States,* 356 U.S. 165, 209 (1958) (Black, J., *Dissenting*).

[2] *Irvin* v. *Dowd,* 366 U.S. 717, 721-22 (1961), citing Columbia University Legislative Drafting Research Fund, *Index Digest of State Constitutions* 578-589 (1959).

[3] "When in respect of any class of offenses the difficulty of obtaining convictions is at all general in England, we may hold it as an axiom, that the law requires amendment. Such conduct in juries is the silent protest of the people against its undue severity. '[I]t has

The notable exception in the criminal process of general acquiescence of juries in the present state of the law is the not infrequent practice of juries to convict of a lesser offense, especially in capital cases, as a protest against the severity of punishments.[4]

The Supreme Court and lower courts in a long line of cases have struck down various practices of tampering with the jury selection process which produces jury panels that are predisposed against the defendant. These cases stand for the principle that a defendant is entitled to trial by an impartial jury, a truly democratic body, composed of a representative cross-section of the population.

> The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status as that which he holds.—*Strauder* v. *West Virginia,* 100 U.S. 303, 308 (1880).

> But they [the officials charged with choosing jurors] must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of the jurors by any method other than a process which will insure a trial by a representative group are under-

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the important and useful consequence, that laws totally repugnant to the feelings of the community for which they are made, cannot long prevail in England.'" Forsyth, *History of Trial by Jury* 431 (1852), citing Lord John Russell, *Essay on English Government* 393.

[4] Comment, *Compromise Verdicts in Criminal Cases,* 37 Neb. L. Rev. 802, 808-811 (1958); Comment, *Jury Discretion Over Death Penalty,* 12 N.Y. L. Forum 688, 691 (1966).

> mining processes weakening the institution of jury trial, and should be sturdily resisted. *Glasser* v. *United States,* 315 U.S. 60, 86 (1942).

Manipulation of the jury system by disabling some class of the population from jury service causes injury "not limited to the defendant—there is an injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard* v. *United States,* 329 U.S. 187, 195 (1946).

This concept was first applied to hold that a Negro criminal defendant is denied equal protection of the laws in violation of the Fourteenth Amendment, if he is required to submit to trial by a jury drawn from a panel from which the state has purposely excluded persons of the Negro race. *Strauder* v. *West Virginia, supra; Norris* v. *Alabama,* 294 U.S. 587 (1935). Similarly it is unconstitutional to try a Mexican American by a jury from which persons of Mexican descent have been deliberately excluded. *Hernandez* v. *Texas,* 347 U.S. 475 (1954). A recent Federal District Court case logically extends this authority to hold unconstitutional the exclusion of women from jury duty. *White* v. *Crook,* 251 F. Supp. 401 (D.C. Ala. 1966). See dictum to the same effect regarding the exclusion of women from juries in *Ballard* v. *United States,* 329 U.S. 187 (1946). The exclusion of members of the defendant's political party from jury duty was determined to be prejudicial in *Kentucky* v. *Powers,* 139 Fed. 452 (C.C. Ky. 1905). Recently the Supreme Court of Maryland reversed the conviction of a Buddhist on the ground that he was denied equal protection by the state requirement that members of

juries demonstrate a belief in God. *Schowgurow* v. *State*, 240 Md. 121, 213 A.2d 475 (1965).[5]

Beyond jury service restrictions based on race, religion and sex, there remain less obvious, but equally prejudicial, discriminations arising from economic and sociological classification. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946), was a case of economic class discrimination. The clerk of court and jury commissioner had deliberately excluded from jury lists all persons who worked for a daily wage, on the theory that most of them would be excused for financial hardship to avoid losing work with compensation limited only to the low per diem jury fee. The Court reversed on statutory grounds, but stated the established requirement that juries be composed of a cross-section of the community and said wage earners "constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in all or in part without doing violence to the democratic nature of the jury system." 328 U.S. 217, 223. Two recent cases of the Court of Appeals for the Fifth Circuit have extended the application of this case. *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966), struck down the "key man" system of jury selection in federal courts, which operated to get "blue ribbon" juries on which wealthier and more influential people of the dominant racial group were predominant. *Labat* v. *Bennett*, 365 F.2d 698 (5th Cir. 1966), held unconstitutional the Louisiana procedure of excluding daily wage earners from juries.

On two occasions the Supreme Court has considered methods of jury selection, which did not involve the out-

[5] It has also been held that Catholics cannot be excluded from jury duty. *Juarez* v. *State*, 102 Tex. Cr. R. 297, 277 S. W. 1091 (1925).

right exclusion of well-defined classes of citizens, but which had the potential of producing juries with a proneness to convict or a prosecutorial bias. In *Glasser* v. *United States,* 315 U.S. 60 (1942), the only women who could serve on the federal jury were members of the Illinois League of Women Voters who had attended jury classes, where the lecturers presented the view of the prosecution. The Court said:

> The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high principled or imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when members of those organizations from training or otherwise acquire a bias in favor of the prosecution.—315 U.S. 60, 86.

In *Fay* v. *New York,* 332 U.S. 261 (1947), the Court was faced with a challenge to state "blue ribbon" juries which were drawn from the general panel of jurors, after eliminating those exempted from general service, those who had been convicted of a criminal offense or found guilty of fraud or misconduct in a civil case, those who possessed conscientious scruples against the death penalty, those who doubted their ability to put aside opinions formed about a case, those who did not believe they could return a verdict of guilty based on circumstantial evidence, those who had such a prejudice against any law as would preclude finding a defendant guilty of its violation, those who had such a prejudice against any defense in a criminal action as would prevent giving a fair trial, and those who might hold against a defendant his failure to testify in his own behalf.

The "blue ribbon" juries were ordered by trial judges for important or complicated cases. The petitioners showed that certain classes of individuals, such as skilled and semi-skilled workers, laborers, and farmers were virtually unrepresented on the "blue ribbon" panel. Statistics from a period more than ten years prior to the trial in question showed that the ratio of conviction by "blue ribbon" juries was from 82% to 83%, whereas the ratio of conviction by regular juries was 37% to 43%. The Court determined that the petitioners had not proven the procedure was sufficiently prejudicial to themselves to establish denial of Fourteenth Amendment rights. However, the Court said, had the substantial discrepancy in percentage of convictions continued to the time of trial, this fact, in the absence of explanation, might be taken to indicate the "blue ribbon" jury was organized to convict. 332 U.S. 261, 286. Four of the Justices dissented. In his dissenting opinion Mr. Justice Murphy said:

> The Court demonstrates rather convincingly that it is difficult to prove that the particular petitioners were prejudiced by the discrimination practiced in this case. Yet that should not excuse the failure to comply with the constitutional standard of jury selection. We can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof. It may be absent in one case and present in another; it may gradually and silently erode the jury system before it becomes evident.*

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* 332 U.S. 261, 300. The dissenting opinion also identified the right of a defendant to a jury representative of a cross-section of the community as a specific constitutional right. "But there is a

The state's use of challenges for cause in the present case to exclude from the jury those veniremen who had conscientious scruples against capital punishment denied to the petitioner the right of a jury composed of representatives of a cross-section of the community. Of the fifty-three prospective jurors examined, sixteen, or 30%, were excused upon the state's challenge for cause on the ground of opposition to capital punishment. (App. 72) In what material respect did the members of this group of 30%, excused for conscientious scruples against the death penalty, differ from the remaining prospective jurors?

B. Death-Qualified Juries Are in Fact Conviction-Prone Juries.

Prosecuting attorneys and defense lawyers have learned from experience that a juror's attitude on the death penalty is indicative of his attitude on various aspects of the judicial process, and, more specifically, that a juror who favors capital punishment is less likely to indulge in the presumption of innocence of the defendant, is more likely to believe the state's evidence than that of the defendant, and is more likely to convict than acquit. The conception is demonstrated by the frequent practice of prosecuting attorneys to put defendants on trial for a capital offense whether or not the state has enough evidence to obtain a conviction on the capital charge and when the prosecuting attorney intends for the case to be submitted to the jury on a lesser included non-capital offense, solely for the purpose of ob-

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constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions." 332 U.S. 261, 299.

taining a jury that will be friendlier to the prosecution and more apt to return a conviction.[7]

A theoretical framework for support of the observation that juries from which death-scrupled persons have been excluded are more likely to convict than juries from which such persons have not been excluded, is found in the book, *The Authoritarian Personality* by Adorno and others.[8] The authors identified two distinct and universally present personality types, the authoritarian personality and the non-authoritarian personality. Authoritarians are dogmatic. Non-authoritarians are open-minded, libertarian. In the language of the psychologists, the authoritarian tends to be moralistic, extra-punitive, distrustful and suspicious, non love-seeking, exploitive, manipulative, and opportunistic. In contrast the non-authoritarian shows tendencies toward permissiveness, impunitiveness or intra-punitiveness, trustingness, equalitarianism, and love-seeking. The authoritarians are roughly divided into those with politically rightist attitudes and those with politically leftist attitudes.[9]

One would expect politically rightist authoritarians to favor the death penalty, and non-authoritarians (and politically leftist authoritarians) to have conscientious scru-

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[7] L. R. McClelland, *Conscientious Scruples Against the Death Penalty in Pennsylvania*, 30 Pa. Bar Association Quarterly 252 (1959); W. E. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?* 39 Tex. L. Rev. 545 (1961); W. E. Oberer, *The Death Penalty and Fair Trial*, [1964] The Nation 342.

[8] T. W. Adorno, Else Frenkel-Brunswik, D. J. Levinson, and R. N. Sanford, *The Authoritarian Personality* (1950).

[9] R. Christie and P. Cook, *A Guide to Published Literature Relating to the Authoritarian Personality Through 1956*, 45 Journal of Psychology 171 (1958).

ples against the death penalty. At the same time, the politically rightist authoritarian, who possesses the traits of punitiveness, distrustfulness, and suspicion would seem less inclined to accept the presumption of innocence of a criminal defendant, more inclined to believe the evidence of the state, and generally hostile to the defendant. On the other hand, the non-authoritarian, with a predisposition against punishing others, and general attitudes of permissiveness, of trustingness, would seem to have less of a desire to convict, expectably would be more sympathetic to the defendant's side of the case, and in general would have an open and lenient attitude toward criminal defendants.[10]

A jury composed of authoritarians and non-authoritarians selected randomly from the community should not be weighted either in favor of the defendant or in favor of the state, but a jury composed of politically rightist authoritarians, to the deliberate exclusion of all others, would be a jury prone to convict.

These theories have been tested in several psychological studies. The most thorough examination of the subject appears to be that of R. F. Crosson, *An Investigation Into Certain Personality Variables Among Capital Trial Jurors* (1966).[11] This investigator worked with one sample of thirty-six subjects who had served on capital juries in Cuyahoga County, Ohio, and a second set of thirty-six subjects who had served on non-capital juries in the same county and who stated they had scruples against the death

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[10] This theory is developed by W. E. Oberer, *op. cit., supra* n. 7.

[11] Unpublished doctoral dissertation on file in Department of Psychology, Western Reserve University.

penalty.[12] All of the subjects were tested using four standard psychological tests, one for gauging dogmatism, a second for measuring opinionation, a third for measuring critical thinking, and a fourth for testing manifest hostility.[13] The results showed death-qualified jurors to be more conservative than jurors with death scruples by a highly significant measure. Also shown were tendencies of death-qualified jurors to be more dogmatic than jurors with death scruples, and for death-qualified jurors to be more manifestly hostile than jurors with death scruples. Further, there was some evidence that jurors with scruples against the death penalty tended to be better in critical thinking than death-qualified jurors. No difference between the jurors groups as to opinionation was observed.[14] The author concluded, "The death qualification in the voir dire, instead of insuring impartiality, seems rather to undermine the defendant's right to a fair trial because of a personality selectivity which may predispose the jury to his disadvantage."[15]

The description and results of two psychological studies on the relationship between willingness to impose the death

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[12] R. F. Crosson, *op. cit. supra* at n. 11, pp. 43-44.

[13] R. F. Crosson, *op. cit. supra* at n. 11, pp. 15-18, 52-54.

[14] R. F. Crosson, *op. cit. supra* at n. 11, pp. 58-65. The "highly significant" conservatism-liberalism difference, p. less than .001, exceeded by far the alpha criterion of .05. The other tendencies, though relevant, could not be deemed "statistically significant" because they did not exceed this alpha criterion.

[15] R. F. Crosson, *op. cit. supra* at n. 11, Abstract p. 4. "If anti-authoritarian traits are as likely to be represented on the jury as authoritarian traits, then the results of this study suggest that removal of the death qualification from the capital voir dire would be a step in the direction of fairer representation which might better serve justice instead of just the prosecutor."—R. F. Crosson, *op. cit. supra* at n. 11, p. 82.

penalty and inclination to find a criminal defendant guilty were brought to the attention of the Supreme Court of North Carolina by the petitioner, but there is no indication in the opinion that this material was considered by the Court. One was a study conducted by Dr. Faye Goldberg, Assistant Professor of Psychology, Morehouse College, Atlanta, Georgia. (App. 73-77) Dr. Goldberg gave one hundred Negro and one hundred white college students a questionnaire in which several criminal cases were described, ranging in severity of the crime committed. All were cases in which the death penalty could have been given. The subjects were asked to record their judgments as to guilt or innocence. In the questionnaire they were also asked if they had conscientious scruples against the use of the death penalty. The most significant result was that subjects who said they did not have conscientious scruples against the death penalty were more likely to render judgments of conviction, than the subjects who said they did have conscientious scruples against the death penalty.[16] The other study brought to the attention of the Supreme Court of North Carolina was Cody Wilson, *Impartial Juries?*, The Texas Observer (Nov. 17, 1964). (App. 78-80) Dr. Wilson's study also used a questionnaire, which was circulated among two hundred persons, mostly college students. Each student was asked to reach a decision as to guilt or innocence based on written descriptions of five

[16] Sixty-one per cent of the sample answered that they did have conscientious scruples against the death penalty. Other results of the study were that subjects who said they had conscientious scruples against the death penalty (compared with the subjects who said they did not have conscientious scruples against the death penalty), were less likely to convict for a more serious crime than for a lesser crime, were less likely to reject the plea of not guilty by reason of insanity, and were less likely to impose a more severe sentence when they did convict. (App. 76-77)

simulated capital cases. Each subject was asked to indicate the degree of confidence he had in the decisions, and to state whether he had conscientious scruples against the death penalty. The subjects were also asked to agree or disagree with a series of statements, including statements to the effect that the district attorney's interpretation of the facts in a criminal case is usually more reliable than that of the defense lawyer, and that if two witnesses were to give conflicting testimony in a criminal case, the witness for the prosecution would be more believable than the witness for the defense. Among the results of the study were:

(1) People who believe in capital punishment are more likely to judge guilty in response to the cases than are people who do not believe in capital punishment.

(2) People who believe in capital punishment are more confident of the correctness of their judgments of guilt and innocence.

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(4) People who believe in capital punishment are more likely to be biased in favor of the prosecution and against the defendant.[17]

A study by Hans Zeisal, of the University of Chicago Law School, *Some Insights into the Operation of Criminal*

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[17] App. 79-80. It was also found that people who believe in capital punishment are more likely to assess a more severe punishment—even without the death penalty—than are people who have scruples against capital punishment; and that people who believe in capital punishment are more likely to be biased against insanity as a defense than are people who have scruples against capital punishment. (App. 78-80)

Juries (unpublished, on file at the University of Chicago Law School—1957), produced results consistent with the material described above. This study was based on interviews with a number of jurors in Chicago and New York after completion of their terms of service on criminal juries. A formula dependent on the vote of the particular juror and the total number of votes for acquittal or conviction on the initial ballot was used to divide the jurors into five groups, ranging from "very prosecution prone" to "very defense prone." The jurors who had scruples against the death penalty were found to be "somewhat defense prone," and the jurors who had no conscientious scruples against the death penalty were found to be "somewhat prosecution prone." [18]

In the present case 30% of the prospective jurors examined were excluded by reason of conscientious objection to the death penalty. Rates of exclusion of as high as 90% of the jurors examined have been reported.[19] The experience of the criminal bar is that in virtually every capital case a very substantial number of prospective jurors are not permitted to serve because they are opposed to the death penalty. The Gallup Poll provides an index of national public sentiment on the death penalty. In response to the question "Are you in favor of the death penalty for persons convicted of murder?" the 1966 survey showed 42% in favor of the death penalty, 47% opposed to it, and 11% without opinion. The 1953 survey showed 68% in

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[18] H. Zeisel, *Some Insights into the Operation of Criminal Juries* (unpublished, on file University of Chicago Law School—1957) 42-43.

[19] L. R. McClelland, *Conscientious Scruples Against the Death Penalty in Pennsylvania*, 30 Pa. Bar Association Quarterly 252 (1959).

favor of capital punishment, 25% opposed to it, and 7% without opinion. Opposition to the death penalty increased with each successive survey between 1953 and 1966.[20]

Undoubtedly many of the people who are opposed to the death penalty would not refuse to consider the death penalty if asked to do so by the prosecuting attorney and by fellow jurors, especially in the case of an unusually heinous crime, and in many courts such persons could be rehabilitated successfully on voir dire for service on a capital jury. But even if the percentage of the average jury venire which would have to be excused for death scruples in a capital case is well below the Gallup Poll figure of 47%, the true figure must nevertheless be a very substantial one. The device of exclusion for death scruples deprives criminal defendants of the right to be tried by representatives of this very large segment of the general community. When challenges for cause on the grounds of scruples against the death penalty were first used, there was not the widespread opposition to the death penalty that exists today. The problem raised by the present case did not assume its grave character until relatively recent times. Oberer has stated the problem in these terms:

> [T]he gulf between the community and death-qualified jury grows as the populace becomes more infected with modern notions of criminality and the purpose of punishment. Accordingly, the community support for the death penalty becomes progressively narrower, with all that this connotes for the administration of justice. Moreover, as the willingness to impose the death penalty—that is, to be sworn as a juror in a capital

[20] American Institute of Public Opinion, *Gallup Poll Release* (July 1, 1966).

> case—wanes in a particular community, the prejudicial effect of the death qualified jury upon the issue of guilt or innocence waxes; to man the capital jury, the resort must increasingly be to the extremists of the community—those with the least contact with modern ideas of criminal motivation, with the constant refinement of the finest part of cultural heritage, the decidation to human charity and understanding.—W. E. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?* 39 Tex. L. Rev. 545, 556-57 (1961).

The psychological studies incidentally support the judgment of the courts that criminal defendants are prejudiced when members of a particular race, ethnic group, sex, religion, political party, or economic group are deliberately excluded from serving on juries. The study by Hans Zeisal indicated substantial differences in prosecution proneness and defense proneness among women, high income groups, high age groups, low education level groups, persons of Slavic and Italian descent, persons of Irish and English descent, native Americans, Negroes, Protestants, and Jews.[21] Some differences in sex are noted in a study by F. L. Strodtbeck and R. D. Mann.[22]

Of further relevance to the present case, considered in the light of established authority against discrimination in jury composition based on race and sex, are some secondary findings in the studies described above. Crosson's work

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[21] *Op. cit. supra* n. 18, at 29-31.

[22] *Sex Role Differentiation in Jury Deliberations*, 19 Sociometry 3 (1956).

produced a finding that females tended to be more opinionated and at the same time more liberal than males.[23] These findings would indicate that prospective female jurors are more likely than prospective male jurors to be excluded for scruples against the death penalty. In Crosson's limited sample, he found more women jurors than male jurors opposed to capital punishment. This would be consistent with the 1966 Gallup Poll survey, where 47% of the men were found to favor the death penalty, while 38% of the women favored it.[24] Dr. Goldberg found a marked racial difference in attitudes toward capital punishment—76% of the Negro subjects said they had conscientious scruples against the death penalty, as opposed to 47% of the white subjects. (App. 77) The present case is illustrative of the tendency of the challenge for conscientious scruples against the death penalty to eliminate disproportionate numbers of women and Negroes from the jury. Three of the six, or 50% of the Negro prospective jurors were eliminated on this ground, and five of the eight, or 62.5% of the female prospective jurors were eliminated on this ground, whereas 30% was the comparable figure for all of the jurors examined. (App. 72)

C. Exclusion of Jurors With Death Scruples Has No Common Law Basis.

In the early Nineteenth Century, England had a list of some two hundred and thirty capital offenses. It is familiar

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[23] R. F. Crosson, *An Investigation into Certain Personality Variables Among Capital Trial Jurors* 68-69 (unpublished dissertation on file Department of Psychology, Western Reserve University, 1966).

[24] R. F. Crosson, *op. cit. supra* n. 23, p. 49; American Institute of Public Opinion, *Gallup Poll Release* (July 1, 1966).

history that the juries of the time felt the death penalty so disproportionate to most of these crimes that they conspicuously refused to convict.[25] Why was not the crown's challenge for cause on the ground of conscientious scruples against the death penalty invoked to eliminate this practice? The answer seems to be that at the common law there was no challenge for cause for conscientious scruples against capital punishment. At the common law challenges to the polls, or individual jurors, were divided into four categories: (1) propter honoris respectum, excuse on the ground of noble rank; (2) propter defectum, elimination because of being an alien, a slave or bondsman, or want of sufficient estate of freehold or copyhold; (3) propter affectum, excuse for bias or partiality, where the juror is of kin to the defendant, has an interest in the cause, has been a party to an action against the defendant, has formerly been a juror in the same cause, or is the defendant's master, servant, counsellor, steward, attorney, or of the same society or corporation;[26] (4) propter delictum, excuse for a crime or misdemeanor rendering the juror infamous. There was also a miscellaneous category of challenges for cause, some of which were customary and others were by virtue of statutes enacted before the common law was established on the American continent; thus there were

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[25] H. Kalven and H. Zeisel, *The American Jury* 310-312 (1966).

[26] The enumerated challenges propter affectum are *principal* challenges which, if true, could not be overruled. There were also challenges propter affectum to the *favour*, which were for some probable circumstance of suspicion, such as acquaintance with the defendant; the validity of challenges to the *favour* were left to the determination of the *triors*. The *triors*, in the case of the first man called being challenged, were two indifferent persons named by the Court; they were joined by the first juror chosen; and once two jurors were seated, the original *triors* were superseded, and the two first sworn on the jury tried the rest.

excuses for sick and decrepit persons, non-residents, men above seventy years old and persons under twenty-one years old, physicians, attorneys, court officers, and certain clergymen.[27]

Nowhere in the enumeration of challenges is mentioned a challenge for scruples against the death penalty. Two of the earliest American cases which considered the allowance of a challenge for cause on the grounds of conscientious scruples against capital punishment state that no English case has been found on the point.[28]

The earliest English case to be found on this question is *Mansell* v. *Regina*, 8 El. & Bl. 85, 120 Eng. Reprint 32 (Ex. Ch. 1857), which was decided after the common law became fixed in the United States. There one of the jurymen, after going into the box but before being sworn, spontaneously said he had scruples against the death penalty. Counsel for the crown, without assigning cause, prayed the Court that the juror be ordered to stand by. Counsel for the prisoner prayed he show ground for challenge. The Court said, "Undoubtedly, if you feel you cannot do your duty, you are quite right in saying so, and had better withdraw." The juror withdrew. The Court then ordered that the juror "stand by." Peremptory challenges, though allowed to the prisoner, were denied to the king by statute, 33 Edw. I st. 4, re-enacted by 6 Geo. IV, c. 50, s. 29. This statute was ef-

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[27] 3 Blackstone, *Commentaries* *361-365; 1 Coke, *Institutes* *156; 4 Blackstone, *Commentaries* *352.

[28] *Clore's Case*, 49 Va. (8 Gratt.) 606 (1851); Gibson, C.J., dissenting, in *Commonwealth* v. *Lesher*, 17 Serg. & Rawle 155, 161 (Pa. 1828): "If the Crown had all along a right to challenge for this cause, instances of the exercise of it must have occurred. Chief Justice Wray used to compare a case without a precedent to a bastard that had no cousin. . . ."

fectively circumvented by the practice of counsel for the crown, tolerated by the courts, to require unwanted jurors to stand by until the entire panel was gone through, it being necessary for cause to be shown only when the panel was exhausted.[29] The holding in *Mansell* v. *Regina* was grounded on this practice; the Court decided the crown was not bound to challenge the juror for cause until the whole panel had been exhausted.[30]

Quakers were disabled from serving on juries in England by Stat. 7 and 8 Wm. III, ch. 21, and this enactment had the incidental effect of eliminating many jurors with death scruples, but as Gibson, C.J., said, "It is notorious that members of other religious denominations deny the lawfulness of capital punishment." *Commonwealth* v. *Lesher*, 17 Serg. & Rawle 155, 161 (Pa. 1828).

Thus, at the common law, the crown in removing jurors with death scruples, was limited to a practice analogous to the peremptory challenge and to the statute disabling Quakers from jury service. These limitations must have been at the root of the extraordinary number of acquittals in capital cases in early Nineteenth Century England.

In *Commonwealth* v. *Lesher, supra,* the earliest American state case giving any extensive discussion to the question of whether there was a challenge for scruples against the death penalty, Chief Justice Gibson, dissenting, said,

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[29] 4 Blackstone, *Commentaries* *353; 2 Hawkins, *Pleas of the Crown* *413.

[30] The Exchequer Chamber opinion contained dictum by Willes, J., that a man with conscientious scruples against capital punishment, who would be unable to find a verdict of guilty according to the evidence, could be challenged for cause, but no authority was cited for this proposition.

"But the naked fact that no case of the sort has arisen in England, or our sister states, or has arisen in Pennsylvania, *previously to the entire abolition of peremptory challenges by the Commonwealth,* shows conclusively the nature of the mischief, and the remedy for it at the common law." 17 Serg. & Rawle 155, 162.

The great majority of American courts agreed with the majority opinion in *Commonwealth* v. *Lesher* and held the state is entitled to a challenge for cause on the ground of conscientious scruples against the death penalty.[31] In some of these cases the courts were concerned as much with violating the conscience of the jurors, as with according the state a fair trial. *E.g., United States* v. *Cornell,* 2. Cranch C.C. 477, F.Cas. No. 16641 (C.C. R.I. 1820).

The predominant rationale, however, is reflected in an opinion of the Supreme Court of North Carolina:

> A man who has conscientious scruples against capital punishment, no matter how much disposed to discharge his duty, would be an unsafe juror, because he would naturally be influenced by his prejudices and go into the jury-box with such a bias in favor of the prisoner as would render him incompetent to do justice to the State.—*State* v. *Bowman,* 80 N.C. 432, 436-37 (1877).

The courts of Iowa and South Dakota have taken a contrary view. These courts have interpreted state statutes enumerating challenges for cause to hold the state has no right to challenge jurors for cause on the ground of conscientious scruples against the death penalty.

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[31] The cases are collected in Annot., 48 A.L.R. 2d 560 (1956).

> It cannot be said that the state is entitled to have the punishment by death inflicted on any case. The statute authorizes that punishment, in the discretion of the jury, when a person is convicted of murder in the first degree; but the State has no right to a trial by jurors who have no objection against inflicting the death penalty, except as it can secure them by challenging peremptorily those who have such objections. —*State* v. *Lee*, 91 Iowa 499, 502-503, 60 N.W. 119, 121 (1894).

The South Dakota court maintained the same position, *State* v. *Garrington*, 11 S.D. 178, 76 N.W. 326 (1898), until the rule was changed by statute, S. Dak. Laws 1927, ch. 94 (presently codified in S. Dak. Code § 34.3618(10)).

D. The State Is Without Legitimate Interest in Demanding Death-Qualified Juries.

In times past when the death penalty was mandatory for almost all capital crimes, there was considerable justification for allowing challenges of jurors with death scruples, in that if such jurors followed their consciences instead of the charge of the court, they would be compelled to vote for acquittal, and even in cases of clear guilt, the result would be acquittal or a hung jury. At present this reasoning is no longer applicable because the jury now is vested with discretion in capital cases to return a verdict which requires the imposition of a sentence for life imprisonment, instead of execution.[32]

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[32] The relevant North Carolina statutes are N.C.G.S. § 14-17 (murder), § 14-21 (rape), § 14-52 (burglary), and § 14-58 (arson). See R. E. Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Pa. L. Rev. 1099 (1953).

The only right the state presently can assert for the challenge of jurors with death scruples is the right of the state to seek the death penalty. It has been pointed out that prosecuting attorneys frequently assert this right as a pretense, when they have no actual intention of seeking the death penalty, but simply want a jury more friendly to the prosecution. In 1966 there was a single execution in the United States. In 1965 seven persons were put to death. There is great popular dissatisfaction with the denth penalty, as evidenced by the dwindling annual number of persons put to death, by the increasing percentage of persons opposed to capital punishment recorded by the Gallup Poll, and by the growing number of states which have abolished capital punishment.[33] With the death penalty fallen into

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[33] The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Courts* 27 (1967): "The most salient characteristic of capital punishment is that it is infrequently used. During 1966 only 1 person was executed in the United States; the trend over the last 36 years shows a substantial decline in the number of executions from a high of 200 in 1935 to last year's low of 1. All available data indicate that judges, juries, and Governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence. Only 67 persons were sentenced to death by the Courts in 1965, half the number of death sentences imposed in 1961; and 62 prisoners were relieved of their death sentences by commutation, reversals of judgment, or other means. In some States in which the penalty exists on the statute books, there has not been an execution in decades.

"This decline in the application of the death penalty parallels a substantial decline in public and legislative support for capital punishment. According to the most recent Gallup Poll, conducted in 1966, 47 per cent of those interviewed were opposed to the death penalty for murder, while 42 per cent were in favor of it; a poll conducted in 1960 on the same question reported a majority in favor of the death penalty. Since 1964 five States effectively abolished capital punishment. There are now eight States in which the death penalty is completely unavailable and five States in which it may be imposed only for exceptional crimes such as murder of a prison guard or an inmate by a prisoner serving a life sentence, murder of a police officer, or treason."

this condition of disuse, the prospect of the state's successfully obtaining a death penalty in any given case is extraordinarily remote. Moreover, the decision between life and death in North Carolina and elsewhere is in the unbridled discretion of the jury[34]—no standards for their guidance are required or permitted. No sound reason appears why a juror with conscientious scruples against the death penalty should not be competent under this rule to carry to the jury room his notions of the rehabilitative function, as opposed to the retributive and deterrent functions, of punishment. This juror's vote against capital punishment would violate no instruction of the judge; it would simply be an exercise of the unlimited discretion conferred upon the jury to fix the penalty. In asserting the right to challenge jurors with death scruples for cause, the state pursues a narrow and remote interest. Nevertheless, the Supreme Court of North Carolina in the present case, together with courts of several other states, hold that this interest of the state is paramount to the interest of the defendant in securing a trial by an impartial jury.

It might be objected that the relief requested by the petitioner in this case would necessarily abolish the death penalty. Experience indicates this is not true. In Iowa, where the prosecution has been without the challenge for cause of jurors with death scruples since the 1890's, death sentences have in fact been imposed and executions have in fact been carried out. Between 1930 and 1960 at least 10 death sentences, based on jury recommendations for the death penalty, were appealed to the Supreme Court of

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[34] See *State* v. *Manning*, 251 N. C. 1, 110 S.E. 2d 474 (1959); and statutes collected in concurring opinion by Frankfurter, J., in *Andres* v. *United States*, 333 U. S. 740, 766-770 (1948).

Iowa. In the same period, nine defendants were given death sentences upon guilty pleas and appealed their cases to the Supreme Court of Iowa.[35]

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[35] In the following table data from Iowa, the state without a challenge for cause of death-scrupled jurors, is compared with data from Nebraska. Nebraska is contiguous to Iowa and the two states have much in common historically, culturally, and economically. In Nebraska the state is allowed to challenge for cause jurors with scruples against capital punishment. *St. Louis* v. *State*, 8 Neb. 405, 1 N.W. 371 (1879). In Iowa the state has 8 peremptory challenges and 2 "strikes" in a capital case. Iowa Code Ann. Tit. 36 § 779.11 (1939). In both Iowa and Nebraska, the jury returning a verdict in a capital case must determine a sentence of either death or life imprisonment; the determination is binding upon the judge. Iowa Code § 12911 (1939); Neb. Rev. St. § 28-401 (1943). Capital punishment was abolished in Iowa in 1965. The population figures are taken from 1968 *World Almanac* 261. The murder and manslaughter rates are from Federal Bureau of Investigation, *Uniform Crime Reports for the United States* (1942, 1950, 1960). Figures for executions are taken from U. S. Bureau of Census, *Statistical Abstract of the United States* 166 (87th ed. 1966). Figures for appealed capital cases are derived by counting the cases reported in Volumes 228 N. W. through 100 N. W. 2d.

		Iowa	*Nebraska*
Murder and Voluntary Manslaughter Rates (per 100,000 population)			
	1960	.6	2.3
	1950	.7	1.4
	1942	1.3	3.8
Population			
	1960	2,757,537	1,411,330
	1950	2,621,073	1,325,510
	1940	2,538,268	1,315,834
	1930	2,470,039	1,377,963
Executions			
	1950-1959	1	2
	1940-1949	7	2
	1930-1939	8	0
Murder Convictions, 1950-1959, Appealed			
Jury recommended death		2	3
Jury recommended life imprisonment		2	2

(*footnote continued on next page*)

It might also be objected that granting the relief prayed by the petitioner would result in an inordinately large number of hung juries. (See the opinion of the Supreme Court of North Carolina in the present case.) (App. 85-86) This

	Iowa	*Nebraska*
Life imprisonment—recommendation not set out	0	3
Sentence not set out	2	0
Jury convicted lesser offense—second degree, manslaughter, etc.	11	1
Guilty plea—death penalty	3	0
Guilty plea—life imprisonment	1	0
Murder Convictions, 1940-1949, Appealed		
Jury recommended death	2	3
Jury recommended life imprisonment	5	0
Life imprisonment—recommendation not set out	2	2
Sentence not set out	2	1
Jury convicted lesser offense—second degree, manslaughter, etc.	10	2
Guilty plea—death penalty	2	0
Guilty plea—life imprisonment	1	0
Murder Convictions, 1930-1939, Appealed		
Jury recommended death	6	0
Jury recommended life imprisonment	1	2
Life imprisonment—recommendation not set out	7	3
Sentence not set out	6	1
Jury convicted lesser offense—second degree, manslaughter, etc.	20	8
Guilty plea—death penalty	4	0
Guilty plea—life imprisonment	1	0
Summary 1930-1959		
Jury recommended death	10	6
Jury recommended life imprisonment	8	4
Life imprisonment—recommendation not set out	9	8
Sentence not set out	10	2
Jury convicted lesser offense—second degree, manslaughter, etc.	41	11
Guilty plea—death penalty	9	0
Guilty plea—life imprisonment	3	0

objection is based neither on proven facts nor upon sound reasoning. A jury almost invariably disagrees on the first ballot. The jury verdict in almost all cases, civil and criminal, is the product either of compromise or of successful persuasion by one faction of the jury. The same will hold true in a capital case where jurors with death scruples have not been excluded. There would be the distinct possibility that a juror who professes death scruples will be won over by the persuasion of his fellow jurymen, especially in the case of an atrocious or heinous crime. In any event, there would always be room for compromise resulting in a discretionary verdict of life imprisonment instead of death, or a verdict convicting of a lesser included noncapital offense. As in Iowa, the prosecuting attorneys would still possess the right to exercise peremptory challenges to exclude jurors with scruples against capital punishment.[36] Finally, there could be recourse to the bifurcated trial used in several states for capital cases, in which separate juries pass upon the guilt or innocence issue and the issue of life or death sentence.[37]

E. Removal of Death-Scrupled Jurors for Cause Is a Denial of Due Process, Equal Protection, and the Right to Trial by Impartial Jury.

The allowance of the state's challenges for cause of prospective jurors with conscientious scruples against capital punishment in the petitioner's trial denied the petitioner equal protection of the laws and due process of law in violation of the Fourteenth Amendment and denied him trial by an impartial jury in violation of the Sixth Amend-

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[36] *Cf., Swain* v. *Alabama*, 380 U. S. 202 (1965).

[37] *E.g.*, Calif. Penal Code, § 190.1; Tex. Code Crim. Proc. § 37.07.

ment. The Fourteenth Amendment grounds are stated by the Supreme Court in *Fay* v. *New York,* 332 U. S. 261 (1947). "[A] discretion, even if vested in the court, to shunt a defendant before a jury so chosen as greatly to lessen his chances while others accused of a like offense are tried by a jury so drawn as to be more favorable to them, would hardly be '*equal protection of the laws*'." 332 U. S. 261, 285. [Emphasis added.] "Undoubtedly a system of exclusions could be so manipulated as to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of *due process.*" 332 U. S. 261, 288. [Emphasis added.]

Most of the decisions striking down exclusion from jury duty of members of the defendant's race, sex, religion, or other class invoke the Equal Protection Clause. ***E.g.,*** *Smith* v. *Texas,* 311 U.S. 128 (1940). Such cases have been extended rightly to hold the Equal Protection Clause violated when the exclusion of a class of jurors is injurious to the defendant, without regard to whether he is a member of that class. *Allen* v. *State,* 110 Ga. App. 56, 137 S.E. 2d 711 (1964) (white civil rights worker tried by a jury from which Negroes were excluded). There was a denial to the petitioner of equal protection of the laws in that the exclusion from jury service of the class of persons with death scruples was of itself a classification injurious to the petitioner, which was not grounded upon any legitimate state interest. *Smith* v. *Texas, supra.* Also, by the state's use of challenges for cause of jurors with death scruples, the petitioner, as a defendant in a capital case, was denied equal protection of the laws because members of his class of capital defendants were burdened with a disability not extended to the class of non-capital defen-

dants, and this classification by the state was unsupported by any legitimate state interest. *Fay* v. *New York, supra.*

Several lower courts have elaborated on the principle expounded in *Fay* v. *New York, supra,* that a system of jury exclusions can violate due process of law. *Labat* v. *Bennett,* 365 F. 2d 698 (5th Cir. 1966), holds the exclusion of daily wage earners from juries as a class is in violation of the Due Process Clause, because it upsets the integrity of the fact-finding process, which depends on impartial venires representative of the community as a whole. Also in *State* v. *Madison,* 240 Md. 265, 213 A. 2d 880 (1965), the conviction of a defendant who was a member of the Apostolic faith and believed in the existence of God, was overturned on due process grounds, where the jurors had been required to demonstrate a belief in the existence of God.

The Sixth Amendment clause requiring trial by impartial jury is declarative of a common law right cherished by English-speaking peoples. The denial of the right of trial by jury was one of the sparks that ignited the American Revolution. This right was incorporated into the Federal Constitution and the constitution of every state. The Supreme Court declared the fundamental Sixth Amendment right of trial by impartial jury to be binding upon the states in *Parker* v. *Gladden,* 385 U. S. 363 (1966). There a conviction was reversed because a bailiff said in the presence of jurors that the defendant was guilty and also that if there was anything wrong with the finding of guilty the Supreme Court would correct it. This case can be distinguished from *Maxwell* v. *Dow,* 176 U. S. 581 (1900), where it was held permissible for a state to use an eight-man, instead of a twelve-man jury, in a non-

capital case.[38] The distinction is between fundamental criteria of trial by impartial jury, which are within the scope of the federal Constitutional guarantee, and matters not reaching to the central fairness and impartiality of trial by jury, which should be left to the governance of the states.[39] The petitioner in this case has been denied an essential requisite trial by an impartial jury; the removal of jurors with conscientious scruples against the death penalty had the effect of weighting the jury in favor of the prosecution, of making the jury conviction-prone.

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[38] Of course, the dictum in *Maxwell* v. *Dow* that the Sixth Amendment right of trial by jury is not applicable to the states, was clearly rejected by *Parker* v. *Gladden*. The remaining Sixth Amendment guarantees have been extended to state trials: speedy trial by *Klopfer* v. *North Carolina*, 386 U. S. 13 (1967); public trial by *Re Oliver*, 333 U. S. 257 (1948); being informed by the nature and cause of the accusation by *Williams* v. *New York*, 337 U. S. 241 (1941); being confronted with witnesses against the defendant by *Pointer* v. *Texas*, 380 U. S. 400 (1965); the assistance of counsel for defense by *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); compulsory process for obtaining witnesses in the defendant's favor by *Washington* v. *Texas*, 388 U. S. 14 (1967).

[39] Compare *Ker* v. *California*, 374 U. S. 23 (1963), holding only the "fundamental criteria" of the Fourth Amendment binding upon the states.

II.

The Petitioner's Rights Under the Fourteenth and Fourth Amendments Were Violated by the State of North Carolina by the Introduction of a Rifle at His Trial, on the Ground That It Had Been Taken by Voluntary Consent From the Petitioner's Dwelling, When the Police Officers Had Gained Entry to the House by Producing a Piece of Paper They Claimed to Be a Search Warrant.

A. There Was No Voluntary Consent to the Search of Petitioner's House.

At the petitioner's trial, a rifle seized from his home provided a key piece of evidence for the state. The uncontradicted opinion testimony of the state's ballistic expert was that the .22 caliber Remington rifle seized from the petitioner's home fired the .22 caliber bullet taken from the body of one of the victims, and the two .22 caliber cartridge cases found at the place where the victims had been bound to trees and shot. (App. 63-64)

Shortly after the petitioner was placed under arrest and jailed, four white officers drove to the house where he lived with his grandmother, Mrs. Hattie Leath. Mrs. Leath is a Negro widow and was then sixty-six years old. She lives at the end of a dirt road a mile from the nearest state-maintained highway. The only persons home with her at the time were some of her infant grandchildren. Mrs. Leath recognized the men to be sheriff's deputies. One of the officers approached her front door and said, "I have a search warrant to search your house." Thereupon Mrs. Leath walked out to the porch and allowed the officers to enter. She later testified that she had not

thought she had any choice in the situation. She testified, "He said he was the law and had a search warrant to search the house, why I thought he could go ahead." The officer did not read the search warrant to Mrs. Leath; she took him at his word. The officers found the .22 caliber Remington rifle in a wardrobe off the living room. (App. 7-8, 46-48)

At the trial, the state's solicitor abandoned reliance on the purported search warrant (which was never made a part of the record) and elected to rely solely on the theory that the petitioner's grandmother had freely and voluntarily consented to the search of her house. (App. 43)

When the search of a private home is conducted on the strength of a paper the officer represents to be a search warrant, a finding that the peaceful submission of the occupant to a search *with* a warrant in fact constitutes voluntary consent to a search *without* a warrant, defies reason and is a gross distortion of the Fourth Amendment protection against search and seizure without probable cause.

The Supreme Court declared applicable to the states the Fourth Amendment principle of excluding the fruits of searches and seizures without probable cause in *Mapp* v. *Ohio,* 367 U.S. 643 (1961). It was decided in *Ker* v. *California,* 374 U.S. 23 (1963), that the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, and the state courts must conform to the "fundamental criteria" laid down by the Fourth Amendment and by opinions of the Supreme Court applying that amendment. Save for searches made incident to a lawful arrest and certain other exceptions not relevant here, to come within the Fourth Amendment standards, a search

either must be based on a valid search warrant, or the person whose premises are searched must freely and voluntarily consent to a search without a warrant.[40]

The exclusionary rule has been received with resentment and confusion in some quarters.[41] Some law enforcement agencies appear unwilling to learn the basic Fourth Amendment requirements for search and seizure with a warrant —the concept of probable cause and the procedure of drafting sufficiently informative affidavits and obtaining the issuance of warrants by a magistrate. They may be deterred by a belief that the requirements of a valid search warrant are much more technical and refined than the Supreme Court requires them to be.[42] As any lawyer who frequents state criminal courts can testify, the growing practice of police and prosecutors is to rely on consents to searches instead of search warrants.[43]

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[40] Compare *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Johnson* v. *United States*, 333 U.S. 10 (1948).

[41] See Comment, *Circumventing the Exclusionary Rule*, 15 U. Fla. L. Rev. 427 (1962); D. W. Silverman, *Protecting the Public from Ohio v. Mapp*, 51 A.B.A.J. 243 (1965); J. B. Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 Rocky Mt. L. Rev. 150 (1962).

[42] See *United States* v. *Ventresca*, 380 U.S. 102 (1965).

[43] American Bar Foundation, *Law Enforcement in the Metropolis*, 33-34, 38 (D. M. McIntyre, Jr. ed. 1967), reports on police search practices in Detroit: "The search warrant is used only when the object of the search is a building—usually a dwelling. Because it is the most formalized means for conducting a search and is historically recognized as the most accepted procedure, one would expect frequent resort to the search warrant as a means of searching premises; yet the contrary is true. . . . Observations clearly show that premises are frequently searched by other means, both lawful and unlawful, which are discussed in more detail below.

"A number of police officers were questioned as to the reason for the lack of the use of search warrants. The officers almost uniformly

The Supreme Court has consistently recognized that searches purportedly conducted with the consent of the person in charge of the premises, unless closely scrutinized and regulated, will sap the vitality of the Fourth Amend-

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indicated that they had no knowledge of search warrants, rarely had occasion to obtain one, and were at somewhat of a loss to explain the lack of their use. . . . Two state police officers had this to say concerning search warrants:

> 'We've never had to get a search warrant since the other officer and myself had been at this post, but I suppose you would do it like you would any other warrant. We have gone into people's houses, but only when they have permitted us to do so. For example, only last week we went into an individual's house and looked around, but we only did so when his mother permitted us to search the place.' The troopers claim they 'try to talk the person into it,' *i.e.*, into searching the premises, when and if they feel it is necessary.

"Investigations were observed in which the police felt a search was highly desirable, but they lacked the requisite probable cause to effect an arrest (followed by an incidental search) or to acquire a search warrant. In these circumstances, the police would resort to another major alternative for conducting a lawful search *with consent* from the person to be searched or from the one who had control of the premises to be searched." One of the prosecuting attorneys said a principal reason for the small number of search warrants was that search and seizure is so easily conducted without a search warrant, that it seems fairly useless to go to the trouble, the time, and expense of having one issued. A prosecuting attorney said it was not easy to comply with the exacting standards for search warrants, that defense attorneys constantly jab at search warrants on every conceivable proposition.

In 1954 when federal law enforcement officers were troubled by the constitutional standards for search warrants, as state law enforcement officers are at present, a federal Court of Appeals remarked upon "this increasing practice of Federal officers searching a home without a warrant on the theory of consent . . ." *United States* v. *Arrington*, 215 F.2d 630, 637 (7th Cir. 1954).

The present widespread employment of the consensual search device is reflected by the great volume of litigation on the subject. Many of the cases are collected in Annot., 31 A.L.R.2d 1078 (1953); 9 A.L.R.3d 858 (1966). See Note, 113 U. Pa. L. Rev. 260 (1964); Comment, [1964] U. Ill. L. Forum 653; Note, [1964] Wis. L. Rev. 119.

ment. In *Amos* v. *United States,* 255 U.S. 313 (1921), the Court rejected evidence obtained in this kind of a search, saying, "The contention that the constitutional rights of the defendant were waived when his wife admitted to his home the government officers who came, without warrant, demanding admission to make search of it under government authority cannot be entertained . . . . [I]t is perfectly clear that, under the implied coercion here presented, no such waiver was intended or effected." 255 U.S. 313, 317. In *Johnson* v. *United States,* 333 U.S. 10 (1948), evidence obtained in a purportedly consensual search was rejected. There an officer, who detected the odor of opium outside a hotel room, knocked on the door and identified himself as an officer. When a woman opened the door, the officer said he wanted to speak to her. She stepped back "acquiescently," in the words of the officer, and admitted the officers to the room. The Court said, "Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." 333 U.S. 10, 13. The spirit of these decisions has been developed into a set of precepts for evaluation of searches made with purported consent and without a warrant, by several of the United States Courts of Appeal. A summary of the rules is found in *Judd* v. *United States,* 190 F.2d 649, 650-651 (D.C. Cir. 1951):

> Searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the Fourth Amendment. True, the obtaining of a warrant may on occasion be waived by the individual; he may give his consent to the search and

> seizure. But such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. . . . The Government must show a consent that is "unequivocal and specific" . . . "freely and intelligently given." . . . Thus, "invitations to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force." . . . A like view has been taken where an officer displays his badge and declares that he has come to make a search . . . even where the householder replies "All right." . . . Intimidation and duress are almost necessarily implicit in such situations; if the Government alleges their absence, it has the burden of convincing the court that they are in fact absent.

Consistent with *Ker* v. *California, supra,* federal courts deciding habeas corpus cases brought by state prisoners, hold that in a state criminal prosecution, the burden is upon the state to prove understanding and intentional waiver of Fourth Amendment rights by clear and convincing evidence that consent was voluntarily and specifically given and was not the result of actual or implied coercion. *Hubbard* v. *Tinsley,* 336 F.2d 854 (10th Cir. 1964); *United States* v. *Reincke,* 229 F.Supp. 132 (D.C. Conn. 1964); *Nelson* v. *Hancock,* 239 F.Supp. 857 (D.C. N.H. 1965).

In the present case the search was made on the strength of the warrant, not on any voluntary and freely given consent to the search by the petitioner's grandmother, Mrs. Leath. If the state chose to rely on the warrant at the time the search was made, the state also should have relied on the warrant at the time of trial. A law-abiding citizen

is expected to yield to the search of his premises when confronted with a paper represented by the police to be a search warrant. If the occupant of the premises searched knew that the paper was not in fact a search warrant at all, or was such a defective one that the prosecuting attorney would later be unwilling to subject it to the scrutiny of the court, it strains one's credulity to think that the search would have been so willingly permitted. Surely as a bare minimum it was incumbent upon the state in the present case to show, if it could be shown, that Mrs. Leath would have admitted the officers as readily had they come without what they called a search warrant.

Even putting aside this conduct of the officers, which borders on fraud, the fundamental Fourth Amendment criteria elaborated by *Amos* v. *United States,* 255 U.S. 313 (1921), and *Johnson* v. *United States,* 333 U.S. 10 (1948), would make it almost impossible to find that there was voluntary consent to the search, in view of the circumstances of the age, sex, and race of Mrs. Leath, the physical isolation of her house, the absence of other friendly adults, the number of officers and the suddenness of their intrusion. The state's only evidence on the question of voluntariness of the consent was the testimony of Mrs. Leath; none of the officers were offered to contradict this testimony. Her equivocal and not completely intelligible recollections of her state of mind during the search, given in a tense courtroom in response to the prosecuting attorney's pressing cross-examination, certainly are not clear and convincing evidence of voluntary consent to a warrantless search.

The decision of the Supreme Court of North Carolina that Mrs. Leath's consent to the search was free and vol-

untary is not supported by the evidence.[44] Moreover, the Supreme Court of North Carolina was influenced in its decision to some extent by the simplistic and dangerous notion that so long as inculpating evidence was found, the means of a search are justified by its end:

> Is it unreasonable and unwarranted that the officers, charged with the duty of apprehending the heartless and inhuman perpetrator should use every energy in locating the weapon used and apprehending its user? . . . Their search might reveal nothing, and to some extent absolve the suspect. The fact that it did reveal the presence of the guilty weapon, to which the already-identified assailant had access, justifies the search. (App. 91)

This reasoning, so obviously at odds with the intendment of the Fourth Amendment, has been rejected by the Supreme Court on many occasions.[45]

B. The State Failed to Secure an Intelligent Waiver of the Right to Be Free From Warrantless Searches.

For a consensual search to be effective, there must be "an understanding and intentional waiver" of the constitutional right of protection against unreasonable searches. *Johnson* v. *United States,* 333 U.S. 10, 13 (1948). The Supreme Court has determined the requisites of an effective

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[44] Of course, the question of voluntariness is a combined question of fact and law, and on certiorari the decision of the Supreme Court of North Carolina on the question is not binding, because this is the very issue that must be reviewed and considered anew in the Supreme Court of the United States. *Watts* v. *Indiana,* 338 U.S. 49 (1949).

[45] *E.g., Lustig* v. *United States,* 338 U.S. 74 (1949).

waiver in connection with the Fourteenth and Sixth Amendment right to assistance of counsel, and the Fourteenth and Fifth Amendment privilege against self-incrimination. According to *Carnley* v. *Cochran,* 369 U.S. 506, 516 (1962), an effective waiver of the assistance of counsel requires proof that the "accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." According to *Miranda* v. *Arizona,* 384 U.S. 436, 444 (1966), waiver of the privilege against self-incrimination, with respect to statements stemming from custodial interrogation of the defendant, requires proof of a preliminary warning that the defendant has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed.

Fairness and reason require the application of these well-developed principles to waiver of Fourth Amendment rights. A United States District Court, in a persuasive opinion, has so held. *United States* v. *Blalock,* 255 F.Supp. 268 (D.C. Pa. 1966). This case holds that where the government, offering evidence obtained by search and seizure, contends the occupant of the premises waived his Fourth Amendment rights by giving a voluntary consent to search, the duty is imposed upon the officers who conducted the search to have warned the individual of his right to counsel, his right to remain silent, and his right to refuse a warrantless search.[46]

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[46] "The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The requirement of knowledge in each serves the same purpose, i.e., to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd. . . . To require law enforcement officers to advise the subjects of investigation of their right to insist upon a search warrant would

The Supreme Court has attended the need of the states for basic guidelines to pass upon the validity of search warrants. See *Aguilar* v. *Texas*, 378 U.S. 108 (1964). But with the growing practice of using warrantless searches by consent in substitute for searches with warrants, the law of *Mapp* v. *Ohio* is in danger of being outflanked. Too many lower court decisions, like the one rendered in the present case, choose to operate beyond the limits of the principles laid down in *Amos* v. *United States* and *Johnson* v. *United States*.[47] It is submitted that the Supreme Court, at the very least, should make applicable to the states the principle of these cases, that mere submission to a search demanded under government authority cannot be deemed an effective waiver of Fourth Amendment rights. Although the spirit of this principle is understandable, application of it to specific cases will be difficult, and there would inevitably continue a certain amount of the confusion and irregularity presently found in the lower court cases dealing with searches by consent. There would be something of an analogy to the long and uncertain development of the Fourteenth Amendment law on involuntary confessions, from *Brown* v. *Mississippi*, 297 U.S. 278 (1936), to cases like *Culombe* v. *Connecticut*, 367 U.S. 568 (1961), to *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and finally to *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The lessons learned from the voluntary confession cases lend weighty support to

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impose no great burden, nor would it unduly or unnecessarily impede criminal investigation." *United States* v. *Blalock*, 255 F. Supp. 268, 269-270 (D.C. Pa. 1966). Accord, *United States* v. *Nikrasch*, 367 F.2d 740 (7th Cir. 1966). See the discussion of this question in Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 Colum. L. Rev. 130 (1967).

[47] See the materials collected in Note 43, *supra*.

the argument for the adoption of a true rule of waiver, requiring the police to give to the person whose premises are to be searched a warning in advance of the right to refuse a warrantless search.

C. The Petitioner Has Standing to Complain of the Search of His Premises.

There can be no serious question of the petitioner's standing to challenge the search in question. He was not present at the time the premises were searched, since he was being held in jail. But as a member of the household and a common user and possessor of articles contained in the house, clearly he was within the scope of the Fourth Amendment protection. Standing to raise the question of an unconstitutional search is accorded by *Jones* v. *United States,* 362 U.S. 257 (1960), to any one legitimately connected with the premises where the search occurs.[48]

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[48] See *Elmore* v. *Commonwealth,* 282 Ky. 443, 138 S.W. 2d 956 (1940), a case with many factual similarities to the present one in which the court specifically decided the right to be secure against unreasonable searches and seizures is a personal right and is broad enough to cover the defendant as a member of the family, residing with his father and mother, since it was his dwelling as well as theirs. A posse of officers and citizens visited the home of the 17-year old Negro defendant hours after he was arrested and requested the defendant's mother, in the absence of her husband who was the head of the household, to give them the right to search the home for evidence against her son. The officer's testimony that the defendant's mother willingly gave them permission to search the home was not disputed at the trial. The court found the request to search made to the defendant's mother was to her the equivalent of a demand, a demand from those known to her as "the law." "In her eyes 'the law' was supreme and something not to be resisted or opposed—her apparent acquiescence in the search was most probably a mere outward manifestation of her recognition of the supremacy of the law . . . . " 138 S.W. 2d 956, 961.

Conclusion

The petitioner respectfully prays that the judgment of the Supreme Court of North Carolina in this case be reversed and remanded, for the reasons that (1) the petitioner was denied due process of law and equal protection of the laws, contrary to the Fourteenth Amendment, and was deprived of a trial by an impartial jury, contrary to the Sixth and Fourteenth Amendments, by the allowance of the State's challenges of prospective jurors for cause on the ground of conscientious scruples against the death penalty; and (2) the petitioner was denied due process of law in violation of the Fourteenth Amendment and was deprived of the right to be secure against unreasonable searches and seizures, in violation of the Fourth Amendment, by the seizure and use as evidence of a rifle taken from the petitioner's home without a search warrant and without the effective consent of the person in charge of the premises.

NORMAN B. SMITH
Counsel for Petitioner

In The

Supreme Court of the United States

October Term, 1967

No. 1016

WAYNE DARNELL BUMPER,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

RESPONDENT'S BRIEF

T. W. BRUTON
Attorney General of North Carolina

HARRY W. McGALLIARD
Deputy Attorney General of North Carolina

Justice Building
Raleigh, North Carolina

Counsel for the State of North Carolina,
Respondent.

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RESPONDENT'S BRIEF

Opinion Below

The opinion of the Supreme Court of the State of North Carolina is reported at 270 N.C. 521, 155 S.E. 2d 173.

Jurisdiction

The judgment of the Supreme Court of North Carolina was made and entered on July 24, 1967, and a copy thereof is set out in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented

1. Whether it is a denial of the petitioner's rights under the Fourteenth and Sixth Amendments to the Constitution of the United States in a state proceeding, when a state court denies a timely request by the defendant to disallow the prosecuting attorney's challenges of prospective jurors for

cause on the ground that they are opposed to capital punishment, inasmuch as such disallowance of such challenges would result in a biased jury incapable of rendering verdicts authorized by statute.

2. Whether it is a denial of the defendant's rights under the Fourteenth and Fourth Amendments to the Constitution of the United States in a state proceeding to introduce in evidence the crime weapon seized upon a search, inasmuch as such search was voluntarily consented to by the owner of the weapon and the person in charge of the premises, *or*, if such search was not consented to, inasmuch as the weapon did not belong to the petitioner and was not found in the petitioner's room, and the petitioner was not present at the time of the search.

Constitutional Provisions Involved

Constitution of the United States:

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurdisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

SUMMARY OF THE ARGUMENT

I.

THE STATE OF NORTH CAROLINA DID NOT DENY THE PETITIONER EQUAL PROTECTION OF THE LAWS AND DUE PROCESS OF LAW AND THE RIGHT OF TRIAL BY IMPARTIAL JURY WHEN PROSPECTIVE JURORS WERE EXCUSED AT HIS TRIAL BECAUSE OF CONSCIENTIOUS SCRUPLES AGAINST CAPITAL PUNISHMENT.

A. EXCLUSION FROM A JURY IN A CAPITAL CASE OF PERSONS HAVING CONSCIENTIOUS SCRUPLES AGAINST THE DEATH PENALTY IS CONSTITUTIONALLY PERMISSIBLE AND NECESSARY TO SECURE A FAIR TRIAL AND PROTECT THE STATE'S INTEREST.

This practice has been approved over a period of many years by an overwhelming majority of state courts and a number of federal courts as being a reasonable practice to avoid a biased jury which could not be fair to the State. The right to have a jury drawn from a representative cross-section of the community does not entitle an accused to a prejudiced jury.

B. THERE IS NO RELIABLE BODY OF EVIDENCE TO

SUPPORT THE ASSERTION THAT PERSONS WHO DO NOT HAVE CONSCIENTIOUS SCRUPLES AGAINST THE DEATH PENALTY ARE BIASED BY REASON OF BEING "CONVICTION PRONE".

The studies, upon which is based the contention that jurors who are not opposed to capital punishment are conviction prone, are few in number, small in scope, fragmentary and are highly inconclusive and insufficient to support the proposition urged by the petitioner.

II.

THE PETITIONER'S RIGHTS UNDER THE FOURTEENTH AND FOURTH AMENDMENTS WERE NOT VIOLATED BY INTRODUCING A RIFLE IN EVIDENCE AT HIS TRIAL BECAUSE THE SEARCH WAS LAWFUL AND BECAUSE, EVEN IF UNLAWFUL AS TO THE OWNER OF THE RIFLE AND THE PREMISES SEARCHED, THERE WAS NO INVASION OF THE RIGHT OF PRIVACY OF THE PETITIONER WHO WAS NOT PRESENT AT THE SEARCH.

A. THERE WAS VOLUNTARY CONSENT BY THE PETITIONER'S GRANDMOTHER THAT OFFICERS SEARCH THE GRANDMOTHER'S HOME.

The evidence shows clearly that the consent was not predicated merely upon belief in the existence of a valid search warrant but that the grandmother consented because she did not care and she did not think any evidence of any crime would be discovered.

B. THE PETITIONER HAS NO STANDING TO COMPLAIN OF THE SEARCH OF HIS GRANDMOTHER'S PREMISES AND THE SEIZURE OF HIS GRANDMOTHER'S RIFLE.

There was no invasion of petitioner's right of privacy which is protected by the Fourteenth and Fourth Amend-

ments. He did not own or claim a right to the seized article; he did not own or lease the premises where the article was discovered; his right in the premises consisted of his being a member of his grandmother's household; the article was not found in his bedroom or any place where he had attempted to conceal it; it belonged to his grandmother and was found in the usual place where the grandmother kept it; and he was not present at the time of the search.

Argument

I.

The State of North Carolina Did Not Deny the Petitioner Equal Protection of the Laws and Due Process of Law and the Right of Trial by Impartial Jury When Prospective Jurors Were Excused at His Trial Because of Conscientious Scruples Against Capital Punishment.

A. EXCLUSION FROM A JURY IN A CAPITAL CASE OF PERSONS HAVING CONSCIENTIOUS SCRUPLES AGAINST THE DEATH PENALTY IS CONSTITUTIONALLY PERMISSIBLE AND NECESSARY TO SECURE A FAIR TRIAL AND PROTECT THE STATE'S INTEREST.

The authority and right of the State to exact the death penalty would and could be nullified by a single biased, opinionated juror who has conscientious scruples against imposition of the death penalty.

This is obviously true if such a juror sits on a jury that determines both guilt and punishment.

It is obviously true if he sits on a jury which only determines punishment.

It is obviously also true if he sits on a jury which determines only guilt and not punishment because the same conscientious scruples against the death penalty can operate

on him as a member of the trial of guilt jury as to prevent any subsequent punishment jury from having an opportunity to impose the death penalty.

In STATE v. CHILDS, 269 N. C. 307, at 317, 152 S. E. 2d 453 (1967), PARKER, C. J., briefly described the decisions in State and federal courts, with quotations to indicate their rationale, on the question of allowance of challenge for cause of a juror who has scruples against capital punishment, writing as follows:

"Defendant assigns as errors many rulings of the trial judge granting the State's peremptory challenge for cause of a prospective juror on the *voir dire* because the prospective juror had conscientious scruples against the infliction of the death penalty by the State. These assignments of error are overruled.

"It is a general rule that the State in the trial of crimes punishable by death has the right to an impartial jury, and in order to secure it, has the right to challenge for cause any prospective juror who is shown to entertain beliefs regarding capital punishment which would be calculated to prevent him from joining in any verdict carrying the death penalty. *S. v. Arnold,* 258 N.C. 563, 129 S.E. 2d 229; *S. v. Vann,* 162 N.C. 534, 77 S.E. 295; *S. v. Vick,* 132 N.C. 995, 43 S.E. 626; *S. v. Bowman,* 80 N.C. 432; Annot., 48 A.L.R. 2d 563. The annotation in A.L.R. 2d cites in support of this general rule cases from 35 states (including North Carolina) and from the United States courts. In accord, 4 A.L.R. 2d, Later Case Service, p. 1273, and supplement.

"In *Turberville v. United States,* 303 F. 2d 411, cert. den. 307 U. S. 946, 8 L. Ed. 2d 813, the Court held that the trial court's action in excusing for cause on *voir dire* veniremen who answered affirmatively questions as to whether they were opposed to capital punishment was not in error. The Court, in a scholarly discussion of the question, said in part:

" 'Opposition to capital punishment may be for any

one of a variety of reasons. They range from an unshakable religious conviction as stark as the Old Testament Commandment to a mere intellectual or philosophical distaste. Not all "opposition" to this penalty creates incompetence for jury service. So not all who are "opposed" to captial punishment are necessarily unqualified for service in a capital case. The nub of disqualification on this ground is whether the opposition is of such nature as to preclude an impartial judgment on the facts and the law of the case to be tried.

"' . . . What Simpson is really asserting is the right to have on the jury some who may be prejudiced in his favor—*i.e.*, some who are opposed to one possible penalty with which he is faced. We think he has no such constitutional right. His right is to absolute impartiality.'

"The whole subject here under consideration was thoroughly explored in an exhaustive, scholarly opinion by Circuit Judge Hincks writing for a unanimous Second Circuit in *United States v. Puff*, 211 F. 2d. 171, cert. den. 347 U.S. 963, 98 L. Ed. 1106. We refer to the *Puff* case and rely upon it.

"Defendant contends that we should reconsider our decisions that in a prosecution for a capital felony the State is entitled to challenge for cause any prospective juror who has conscientious scruples or beliefs against the infliction of the death penalty by the State, for the following reasons: That he is entitled to a 'balanced' jury, composed of jurors who believe in capital punishment and those who do not; that jurors who believe in capital punishment are more prone to convict than those who do not so believe; and that to exclude jurors who do not believe in capital punishment denied him a fair and impartial jury from a cross-section of the community. These contentions have been refuted in *United States v. Puff, supra,* which case holds, *inter alia,* as stated in the eleventh and twelfth headnotes to this case:

"'11. Under statute providing for prosecution of murder in first degree and making death penalty manda-

tory, upon conviction, unless jury recommends life imprisonment, a verdict must be unanimous both as to guilt and as to punishment. 18 U.S.C.A. § 1111.

" '12. In prosecution for murder under statute making death penalty mandatory unless jury should recommend life imprisonment, defendant was not entitled to a balanced jury in the sense of including jurors who held scruples against imposition of death penalty. 18 U.S.C.A. § 1111.'

"In its opinion the Court said:

" 'It will readily be seen that this "balanced" jury, which the defendant envisages is in reality a "partisan jury"; if, as he urges, it may include jurors with bias or scruples against capital punishment it must—if it is to have "balance"—include also those with bias in favor of the death penalty as the punishment for murder. It is settled by *Andres v. United States*, 333 U.S. 740, 68 S. Ct. 880, 92 L. Ed. 1055, that under the Statute the verdict must be unanimous both as to guilt and as to punishment. As a result, as Mr. Justice Frankfurter noted in his concurring opinion, 333 U.S. at page 766, 68 S. Ct. at page 892, any juror "can hang the jury if he cannot have his way" as to the sentence which *he* deems appropriate. These considerations lead to the conclusion that trials before "balanced juries," even on unanimous findings of guilt, would frequently result in disagreements. And disagreements on successive trials would result in practical immunity from murder. We cannot believe that the Statute was intended to have such a tendency.'

"This is said in Annot., 48 A.L.R. 2d, p. 563:

" ' Upon the theory that conscientious scruples against infliction of the death penalty under any circumstances, or equivalent beliefs, equally disqualify a juror for cause in a prosecution for a capital crime, whether the law prescribes the single punishment of death upon convic-

> tion, or invests the jury, upon conviction, with a discretionary power to assess death or life imprisonment according to the evidence and circumstances, the rule has become generally accepted that where the jury is vested with such discretion the state may challenge for such cause because it is entitled to the maximum penalty if the proof shall justify it, and to contend throughout the trial and finally to the jury that the character of the crime justifies it.' "

In UNITED STATES v. Puff, 211 F. 2d 171, at 184, the following is stated:

"In Gillars v. United States, 87 U.S. App. D.C. 16, 182 F. 2d 962, 980, a juror had been asked on *voir dire* whether she was 'opposed to the death penalty'. It was held that her reply that 'she was opposed to the death penalty and did not believe she could render a fair and impartial verdict in the case' was a disclosure of a disqualification requiring excuse for cause, and the question asked was not held to be improper.

"And in Stroud v. United States, 251 U.S. at page 380, 40 S. Ct. 176, 64 L. Ed. 317, it was held that a juror should be excused for cause if from his preliminary examination it is 'reasonably certain that in the event of conviction for murder in the first degree he would render no other verdict than one which required capital punishment.' If jurors with bias *in favor* of capital punishment are disqualified, certainly jurors with bias *against* the death penalty should be similarly disqualified. Any holding to the contrary would make not for 'balanced juries' but rather for lop-sided juries.

"Turning to an examination of the cases in the state courts on the point, we find at least three cases in which the defendants made the very argument advanced here, *viz.*, that the modification of a statute under which the death penalty was mandatory by provision of an alternative punishment by imprisonment with power in the jury to decide between the two alternatives, impliedly repealed the disqualification

for scruples against capital punishment which had theretofore existed. But in each, the courts held otherwise. State v. Owen, 1953, 73 Idaho 394, 253 P. 2d 203; Rhea v. State, 1902, 63 Neb. 461, 88 N.W. 789; State v. Riley, 1923, 126 Wash. 256, 218 P. 238. And in many other states having statutes similar to the Federal Statutes of 1897 it has been held that scruples against capital punishment are a disqualification. Demato v. People, 1910, 49 Colo. 147, 111 P. 703, 35 L.R.A., N.S., 621; Gross v. State, 1850, 2 Ind. 329; Price v. State, 1930, 159 Md. 491, 151 A. 408; Borowitz v. State, 1917, 115 Miss. 47, 75 So. 761; State v. Wooley, 1908, 215 Mo. 620, 115 S.W. 417; State v. Juliano, 1927, 103 N.J.L. 663, 138 A. 575; Commonwealth v. Bentley, 1926, 287 Pa. 539, 135 A. 310. It is perhaps worth noting that in Commonwealth v. Bentley, the court cited the rule of Logan v. United States, supra, [Logan v. United States, 1892, 144 U. S. 263, 12 S. Ct. 617, 36 L. Ed. 429] decided prior to the 1897 Statute, as applicable under a state statute substantially the same as the 1897 Statute. For other cases in states which have similar statutes in which the disqualification exists under sanction of statute, see the following: Leigh v. Territory, 1906, 10 Ariz. 129, 85 P. 948; People v. Rollins, 1919, 179 Cal. 793, 179 P. 209; Smith v. State, 1911, 5 Okl. Cr. 282, 114 P. 350; Gonzales v. State, 1893, 31 Tex. Cr. R. 508, 21 S.W. 253, 254; State v. Greer, 1883, 22 W. Va. 800; State v. Melvin, 1856, 11 La. Ann. 535.

"So far as we are aware, the only states in which there are decisions to the contrary are Iowa and South Dakota. See State v. Lee, 1894, 91 Iowa 499, 60 N.W. 119; State v. Wilson, 234 Iowa 60, 11 N.W. 2d 737; and State v. Garrington, 1898, 11 S.D. 178, 76 N.W. 326.

"It will be noted that all the cases above cited stem from the fundamental theory that the American jury should be composed of impartial jurors. As a result, a party is entitled to an array of impartial jurors to which he may direct his peremptory challenges. To this a party is entitled as of right. But granted this, a party is entitled to no more. Having no legal right to a jury which includes those because of scruple or bias he thinks might favor his cause, he suffers no prejudice if jurors, even without sufficient cause, are

excused by the judge. Only if a judge without justification overrules a challenge for cause and thus leaves on the panel a juror not impartial, does legal error occur. And often the failure of a party to exhaust his peremptory challenges is taken as convincing indication that, even if a talesman without sufficient justification had been excused for cause, at least those who were impanelled were indeed impartial."

Thus the overwhelming weight of authority of the decisions of State courts and federal courts is to the effect that the State in capital cases is entitled to exclude from jury service biased jurors who have conscientious objections to the death penalty, and no constitutional rights of an accused are infringed thereby.

B. THERE IS NO RELIABLE BODY OF EVIDENCE TO SUPPORT THE ASSERTION THAT PERSONS WHO DO NOT HAVE CONSCIENTIOUS SCRUPLES AGAINST THE DEATH PENALTY ARE BIASED BY REASON OF BEING "CONVICTION PRONE".

In the instant case the accused raped a young woman at gun point, shot both the woman and her companion with the announced intention of killing them, and left them for dead. The jury which convicted him recommended life imprisonment which made a sentence of life imprisonment mandatory.

In the face of the above, petitioner's counsel is contending that the defendant was not tried by a proper jury because the jury was made up of a "conviction prone" jury.

The petitioner argues that a person who does not have conscientious scruples against the death penalty is more likely in any given case to convict than a person who does have such scruples. Many disagreeable and unflattering traits and charactersitics are attributed to this juror who believes the death penalty may be appropriate under some circumstances for some murderers and rapists. Although the "studies" made in this field are few, and the number of

persons interviewed pitifully small and sometimes unrepresentative, there has been no hesitancy in basing wildly extravagant conclusions on them.

We are told that the so-called death-qualified juror, or the person who does not have conscientious scruples against the death penalty, is hostile, prosecution prone, an extremist, and an authoritarian. On page 25 of his brief, petitioner states with respect to "authoritarians":

"Authoritarians are dogmatic. Non-authoritarians are open-minded, libertarian. In the language of the psychologists, the authoritarian tends to be moralistic, extra-punitive, distrustful and suspicious, non love-seeking, exploitive, manipulative, and opportunistic. In contrast the non-authoritarian shows tendencies toward permissiveness, impunitiveness or intra-punitiveness, trustingness, equalitarianism, and love-seeking. The authoritarians are roughly divided into those with politically rightist attitudes and those with politically leftist attitudes.

"One would expect politically rightist authoritarians to favor the death penalty, and non-authoritarians (and politically leftist authoritarians) to have conscientious scruples against the death penalty. At the same time, the politically rightist authoritarian, who possesses the traits of punitiveness, distrustfulness, and suspicion would seem less inclined to accept the presumption of innocence of a criminal defendant, more inclined to believe the evidence of the state, and generally hostile to the defendant. On the other hand, the non-authoritarian, with a predisposition against punishing others, and general attitudes of permissiveness, of trustingness, would seem to have less of a desire to convict, expectably would be more sympathetic to the defendant's side of the case, and in general would have an open and lenient attitude toward criminal defendants."

This is purely a side matter, but it is noted that it is asserted that politically rightist authoritarians favor the death penalty and politically leftist authoritarians do not.

If this line of reasoning is followed it can be understood that Mussolini and Hitler would be likely to favor capital punishment, but when did Stalin and Castro have conscientious scruples against the death penalty?

Others in discussing the attributes of the person without conscientious scruples have described such a juror as being an unrepresentative subgroup of the community, punitive, arbitrary, autocratic and unenlightened. Such a juror has been called partial and biased while scrupled jurors are said to have greater humanity, compassion, impunitiveness and objectivity. Petitioner has not used all the above descriptive phrases, but they have been used by others who have joined in advocating the same thesis.

It is submitted that there is no evidence available which could be said to give any substantial support to petitioner's contention.

It is conceded that in recent times public or popular polls of selected persons have yielded highly accurate guesses as to personal attitudes. In the instant case, however, we are confronted at the outstart with a paucity of studies in the field and with the fact that an exceedingly small number of persons have been interviewed in all the studies combined.

In the Goldberg study (App. 73-77), the persons interviewed were a mere 200 college students.

In the Wilson study (App. 78-80), a mere 200 persons were interviewed and, again, they were mostly college students.

In the Zeisel study, referred to in petitioner's brief, pp. 29-30, which study apparently is unpublished, and on file at the University of Chicago Law School, a number of jurors (approximately 1,248) were interviewed.

In the Crosson study, referred to in petitioner's brief, a total of 72 persons, who had served on juries, were interviewed.

There may have been other studies made in this field but, if so, respondent's counsel is not familiar with them and petitioner's counsel does not cite them. Surely no serious contention can be made that an accurate and valid conclusion can be drawn as to the psychological and sociological attitudes and predilections of 200,000,000 people—or so many of them as are of jury age—on the basis of a few scattered studies of a total of little more than 1700, at least 400 of whom were specialized groups (college students) and probably in many instances under jury service age.

II

THE PETITIONER'S RIGHTS UNDER THE FOURTEENTH AND FOURTH AMENDMENTS WERE NOT VIOLATED BY INTRODUCING A RIFLE IN EVIDENCE AT HIS TRIAL BECAUSE THE SEARCH WAS LAWFUL AND BECAUSE, EVEN IF UNLAWFUL AS TO THE OWNER OF THE RIFLE AND THE PREMISES SEARCHED, THERE WAS NO INVASION OF THE RIGHT OF PRIVACY OF THE PETITIONER WHO WAS NOT PRESENT AT THE SEARCH.

A. THERE WAS VOLUNTARY CONSENT BY THE PETITIONER'S GRANDMOTHER THAT OFFICERS SEARCH THE GRANDMOTHER'S HOME.

A description of the evidence relating to the question of consent to the search is well set out by PLESS, J., in the opinion below, and the reasons of the North Carolina court supporting the conclusion that the search was voluntarily consented to, are succintly summarized as follows: (Appendix pp. 87-90)

"The defendant complains of the search of his grandmother's house which resulted in finding a rifle that has been identified as the one which fired the shots into the bodies of Mrs. Nelson and Monty Jones. But it must be remembered (1) that his premises were not searched—they were his grandmother's; (2) *his* rifle was not taken

—it was his grandmother's; (3) *she* gave permission for the search and has not yet complained of it. Since the Solicitor announced that he was not relying upon the search warrant but upon permission given by the owner of the premises for its search, the question arises as to whether her consent was voluntarily given. While there are decisions that the presence of officers and the announcement (fol. 133) that they wish to search premises constitutes a condition in whch coercion and intimidation may be present, they are not applicable here.

"The defendant sought an order of the Court requiring the State to return the rifle and to suppress evidence regarding it. In support of the motion they offered the affidavit of Mrs. Hattie Leath in which she said: 'On Tuesday, August 2, 1966, at about 2:00 P.M., four white men drove up to her house in two cars. She knew these men to be officers of the Alamance County Sheriff's Department, although they were not in uniform . . . One of the deputies came up on the porch of her house and walked up to the front screened door. She was standing immediately inside the door. The deputy said he had a notice or a warrant or something like that, for searching her house. He did not appear to have any paper in his hand, and he did not read anything to her. After hearing this, she did not stop to think about whether the officers had a right to search her house. She simply answered the officer right away by saying, "Go ahead," as she opened the door and stepped out onto the porch. The officers began at once to search the house.'

"During the trial the State offered the rifle which was found in the house, and upon objection to its admission, the Court excused the jury, and Mrs. Leath testified in person. Some of her statements are quoted as follows (the underscoring is ours): 'I own my own house; it belongs to me . . . the defendant Wayne Darnell Bumpers was living with me on that date . . . He has been living with me at this place all of his life . . . Sheriff Stockard came out to my home . . . Four of them came. I was busy about my

work, and they walked up and said, "I have a search warrant to search your house," and I walked out and *told them to come on in* . . . I just told him to come on in and go ahead and search, and I went on about my work. I wasn't concerned what he was about. I was just satisfied . . . I told Mr. Stockard to go ahead and look all over the house. I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything . . . I let them search, and it was *all my own free will.* Nobody forced me at all.' She also said, 'I did have a .22-caliber Remington, single-shot rifle at my house on July 31. Most of the time it stayed inside the wardrobe and then behind the door, out from the living room. This is my rifle . . . I have owned it since my husband bought it'

"It is to be noted that the rifle was not found in the defendant's private room, nor in any part of the house assigned to him, but 'inside the wardrobe, or behind the door.' (fol. 134) Following Mrs. Leath's testimony, the following entry was made by the Court:

> "'The Court: The Court finds that from the evidence of Mrs. Hattie Leath that it is of a clear and convincing nature that she, the said Mrs. Hattie Leath, voluntarily consented to the search of her premises, as is more particularly set forth in her evidence, and that that consent was specifically given and is not the result of coercion from the officers. Motion Denied for suppression of the evidence with reference to the .22-caliber rifle, marked State's Exhibit No. 2.'

"We know no better way to establish that one's actions were voluntary than by the statement and attitude of the person concerned. No interpretation can be placed upon Mrs. Leath's testimony that would sustain any claim of coercion or pressure or intimidation. The defendant cites *Mapp v. Ohio,* 367 U.S. 643 (1961), and we have also had called to our attention the very recent case of *Maryland Penitentiary v. Hayden,* decided by the U. S. Supreme Court

29 May 1967 [87 S. Ct. 1642, 387 U. S. 294]. Upon consideration of them, we find them inapplicable here. Rather, the terse statement of Denny, J., later C. J., speaking for the Court in *State v. Moore,* 240 N. C. 749, 83 S.E. 2d 912, is controlling:

> " 'The first question posed is whether a search warrant was required to search the premises of the defendant if he consented to the search. The answer is no. It is generally held that the owner or occupant of premises, or the one in charge thereof, may consent to a search of such premises and such consent will render competent evidence thus obtained. Consent to the search dispenses with the necessity of a search warrant altogether . . . . The second question is whether the defendant consented for the officers to search his premises . . . The Court found as a fact that the defendant, at the request of the officers, voluntarily gave them permission to search his premises . . . the ruling of a trial judge on a *voir dire,* as to the competency or incompetency of evidence (adduced upon the search), will not be disturbed if supported by any competent evidence.' "

Granting that whether consent to a search is voluntary presents a mixed question of fact and law, the important and conclusive evidence are the words of Mrs. Leath included in the quotation above from the court's opinion:

> " . . . I wasn't concerned what he was about. I was just satisfied . . . I told Mr. Stockard to go ahead and look all over the house. I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything . . . I let them search, and it was *all my own free will.* Nobody forced me at all."

The respondent urges that the evidence was ample to support the trial court's finding that the search was voluntary.

B. THE PETITIONER HAS NO STANDING TO COMPLAIN OF THE SEARCH OF HIS GRANDMOTHER'S PREMISES AND THE SEIZURE OF HIS GRANDMOTHER'S RIFLE.

The home in which the rifle in question was seized was the home of Mrs. Hattie Leath. One son and two grandchildren lived with her and the petitioner, who was nineteen years old, was one of the grandchildren.

Mrs. Leath testified that, "Most of the time it [the rifle] stayed inside the wardrobe and then behind the door, out from the living room. This is my rifle." (App. p. 46) Apparently, this is consistent with the testimony of the State's witness as follows: (App. p. 52)

> "This rifle was in the kitchen, back side of the house, sitting behind the kitchen door as you come in the front door, go to a hall and the kitchen. I took that rifle in my possession at that time. I took the rifle to Raleigh to our lab."

This brings us directly to the question of whether we have here a situation where the right of privacy of the petitioner was unconstitutionally infringed. To summarize briefly the pertinent factual aspects, the place searched was the home of the grandmother of the petitioner. Petitioner lived in this home with his grandmother. The crime weapon, a rifle, which was seized was not the property of the petitioner. The rifle was not found in the bedroom or other portion of the house, but in the kitchen. There is no evidence that the petitioner was present at the time of the search and the implication seems to be that he was not present.

> ". . . [T]herefore, . . . one may not object to an illegal or unreasonable search of the property, premises, or possessions of another, if his own privacy is not unlawfully invaded." 79 C.J.S. 812, *et seq.*

In an attempt to analyze this situation and determine the

proper applicability of the relevant court decisions, a number of cases have been studied, particularly JONES v. UNITED STATES, 362 U. S. 257, 261, 80 S. Ct. 725, 731, 4 L. Ed. 2d 697 (1960); UNITED STATES v. BOZZA, 365 F. 2d 206 (2d Circ. 1966); and UNITED STATES v. MANCUSI, 379 F. 2d 897 (2d Circ. 1967)

The property seized was not the property of the petitioner. It is realized that, because of the dilemma presented an accused when contraband property is involved, it is no longer necessary or essential that an accused either own or allege ownership or a possessory interest in the property seized. However, it is pointed out here for such bearing as it may have that the weapon in question did not belong to the petitioner before it was used in the commission of the crime and that, after the commission of the crime he, or someone, had apparently returned the rifle to the usual place where the grandmother owner of the rifle usually kept it in her house, namely, behind a door, in the kitchen or off the hall. When the rifle was returned to its usual resting place, where the grandmother habitually kept it, it would appear that the petitioner had surrendered any rights he might theretofore have had with respect to a search for the rifle at any place other than perhaps the room assigned to him.

It has been said that if the search was *directed at* a defendant, then he has standing to object to the search of any premises where he is lawfully entitled to be, apparently, provided he was physically present at the time the search was made. It must be admitted that, in one sense, the search was certainly directed at the defendant since he was the suspect, and not the grandmother, but in a purely physical sense, the search and seizure was directed against the grandmother's house and the grandmother's rifle.

The following in UNITED STATES v. BOZZA, *supra,* at 222-223, is apropos:

"The Supreme Court's most recent comprehensive statement on the subject of 'standing' to invoke the rule exclud-

ing real evidence obtained by illegal search and seizure is Jones v. United States, 362 U.S. 257, 261, 80 S. Ct. 725, 731, 4 L. Ed. 2d 697 (1960). The Court there said, through Mr. Justice Frankfurter:

> " 'In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41 (e) applies the general principle that a party will not be heard to claim a constitutional protection unless he "belongs to the class for whose sake the constitutional protection is given." Hatch v. Reardon, 204 U.S. 152, 160 [27 S. Ct. 188, 190, 51 L. Ed. 415]. The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy.'

"Consistent with that view the Court has held that a defendant has standing to object not only to a search of premises owned or leased by him but also to the search of premises where he was present by consent of the owner or possessor, Jones v. United States, supra, 362, U.S. at 265-267, 80 S. Ct. 725; to the seizure of property for the illegal possession of which he is charged, Jones v. United States, supra, 362 U.S. at 263, 80 S. Ct. 725; and to the seizure of property owned or possessed by him and stored in the premises of another to which he had access, United States v. Jeffers, 342 U.S. 48, 72 S. Ct. 93, 96 L. Ed. 59 (1951). The instant case does not come within either the general language of the quoted passage or these specifications. The gun stolen from the Hillsdale Post Office remained the property

of the United States; the thieves abandoned its possession to Guzzo; none of them was present in Guzzo's home at the time of the search; and none was charged with an offense for mere possession of the gun."

In UNITED STATES v, MANCUSI, *supra,* at 904, the following is stated:

> "In United States v. Bozza, 365 F. 2d 206 (2d Cir. 1966), for example, the appellants had abandoned possession of a stolen gun to Guzzo, one of the members of the burglary ring. None of the appellants claimed any legitimate interest in the weapon; nor had any of them been present in Guzzo's home when the allegedly illegal search occurred. In those circumstances we denied standing stating that '[t]he values that the Fourth Amendment protects are sufficiently advanced by excluding the results of illegal searches and seizures at the behest of "victims" *in the broad sense the Supreme Court has given that term* * * *.' Id. at 223. (Emphasis added.)"

The State contends that at some stage along the way, a person's "privacy" ceases to exist so far as invoking the protection of the Fourth Amendment is concerned. There is a point reached when his "privacy" has become of such a shadowy, tenuous and insubstantial nature that its protection must give way to the need for the public's protection from murderers, robbers and rapists. Inasmuch as the defendant did not own or claim the rifle, or own or claim the home where the rifle was found although he had permission to live there, and was not present at the time of the search, there has not in this case been an invasion of the petitioner's privacy in such a sense as to violate the Fourth Amendment.

It is submitted that the facts of this case do not warrant a conclusion that the petitioner himself was the victim of an invasion of privacy.

Conclusion

The respondent respectfully prays that the judgment of the Supreme Court of North Carolina in this case be affirmed

for the reasons that (1) no constitutional rights of the petitioner were infringed by excluding from the jury persons with conscientious scruples against capital punishment, and (2) no constitutional rights of the petitioner with respect to searches and seizures were infringed by offering in evidence the crime weapon, which did not belong to the petitioner and which was seized in petitioner's grandmother's kitchen when petitioner was not present.

Respectfully submitted,

T. W. BRUTON
Attorney General of North Carolina

HARRY W. McGALLIARD
Deputy Attorney General of
North Carolina

Justice Building
Raleigh, North Carolina

Counsel for the State of
North Carolina, Respondent

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1016

WAYNE DARNELL BUMPER,

Petitioner,

—v.—

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH CAROLINA

PETITIONER'S REPLY BRIEF

NORMAN B. SMITH
Counsel for Petitioner

SMITH, MOORE, SMITH, SCHELL & HUNTER,
700 Jefferson Standard Building,
P. O. Drawer G,
Greensboro, North Carolina 27402
Telephone No. 273-8264

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ARGUMENT

I. The recent case of Crawford v. Bounds supports petitioner's contentions.

The unbroken line of authority, cited by the respondent, upholding the constitutionality of challenging for cause jurors with conscientious scruples against the death penalty was breached by an incisive opinion of the United States Court of Appeals for the Fourth Circuit filed on April 11, 1968, *Crawford* v. *Bounds*, —— F. 2d —— (4th Cir. 1968) (hereinafter references to parts of this decision will be to the page number of the respective unprinted major opinion and concurring opinions). This was a habeas corpus proceeding brought by a Negro who was convicted in North Carolina of murder by a jury without recommendation of mercy and sentenced to death. In accordance with the usual North Carolina practice the state had been allowed to have excused for cause jurors who possessed conscientious scruples against the death

penalty. The major opinion of the court, written by Judge Winter, rested the decision of the court "on the systematic exclusion of jurors in violation of the equal protection guarantee resulting from the disqualification of jurors to try the issue of guilt who expressed reservations about the imposition of capital punishment . . ." (major opinion pp. 14-15). The Court of Appeals for the Fourth Circuit found it necessary to reject the array of existing authorities to the extent they stood "for the proposition that a prospective juror in a capital case may be constitutionally disqualified simply for holding sentiments against capital punishment where death is not the only punishment and where the effect of juror disqualification is to eliminate a substantial portion of the jury venire, . . ." (major opinion p. 21).

The major opinion in *Crawford* v. *Bounds* was grounded on the Equal Protection Clause. Judge Winter had no difficulty in finding jurors with conscientious scruples against capital punishment to be a discrete group, of whose exclusion from jury service defendants have standing to complain, without regard to whether the jurors who remain would be prosecutorily biased, or to whether the excluded jurors would be more inclined to vote for acquittal. The court said it is sufficient,

> to know only that such a substantial percentage of the populace generally is different from the remaining populace in having a different basic concept of punishment in even the most heinous crimes which may stem, . . . from divers and diverse reasons, from unshakable religious convictions to intellectual or philosophical distaste. Such a group would comprise a variety of views and a variety of approaches and, if allowed to serve, may well have a "subtle interplay of influence"

upon others. *Ballard* v. *United States, supra,* p. 194. As a group it would seem as readily identifiable as the wage earners in *Thiel* v. *Southern Pacific Co., supra.*—Major opinion pp. 27-28.

In the major opinion it was stated to be unnecessary to consider the due process problems raised by the case. However, Judges Sobeloff and Craven in concurring opinions expressly relied on the Due Process Clause and the Sixth Amendment right to trial by jury in agreeing that the conviction must be set aside. Judge Sobeloff cited with favor the findings of Goldberg and Wilson to which the court's attention has been invited by the petitioner in the present case.

It is difficult to escape the conclusion that the automatic disqualification of from 30% to 45% of the available jurors in capital cases destroys the representative character of the jury. That the submission of the question of guilt to the special group which remains after the siphoning process has a tendency to favor the prosecution has been affirmed by legal scholars and psychologists. Even though the major opinion refuses to accept these studies, it recognizes that the excluded group, if allowed to serve, "may well have a 'subtle interplay of influence' on the others. This is enough, for the due process claim stands upon the unrepresentative character of the list, and it is unnecessary to speculate as to the effect this particular group might have if permitted to participate. *Ballard* v. *United States,* 329 U.S. 187 (1946).[1]—Sobeloff concurring opinion, pp. 3-4.

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[1] The seven judge panel of the Court of Appeals for the Fourth Circuit unanimously reversed the appellant's conviction. The four

The petitioner submits that the opinions of the Court of Appeals for the Fourth Circuit in *Crawford* v. *Bounds* are especially worthy of recognition by the Supreme Court because it is the first of the many decisions having to do with the constitutionality of challenging jurors with death scruples which has isolated the several interests involved, given due weight to the growing body of psychological and legal literature on the subject, and probed beneath the apparent issues on the surface to find and analyze in depth the ultimate questions at stake.

II. In the briefs of respondents and amici, an erroneous burden to prove factual issues is assumed.

The N.A.A.C.P. Legal Defense and Education Fund amicus curiae brief asserts that the record of this case is inadequate because the petitioner has failed to meet some undefined burden of proof on the questions: (1) what proportion of the population possesses conscientious scruples against the death penalty; (2) whether the class of persons with scruples against the death penalty contains disproportionate numbers of women, Negroes, and other demographic groups; (3) to what extent persons with death scruples share common attributes; (4) to what extent these shared attributes dispose these jurors to greater humanity and compassion; (5) to what extent these common attributes dispose such jurors to greater responsibility and capacity for differentiations; (6) to what extent these com-

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judges, whose opinions are not discussed in the text above, concurred solely on the ground that a double standard was applied during the voir dire, in that one juror who said he believed it would be his duty to sentence a defendant found guilty of murder to capital punishment was retained on the jury, while many jurors were excused without further inquiry only after expressing sentiments or reservations against the death penalty.

mon attributes dispose such jurors toward greater fairness and rationality in fact findings and fixing penalties; (7) the standards for penalty determinations actually used by death-qualified capital juries; (8) the extent of the ability of jurors with death scruples to lay aside their scruples under direction of the court; (9) the extent to which scruples against infliction of the death penalty may influence a juror's determination of the question of guilt or innocence, where the juror sits only to determine that question; and (10) the relative practicability of single verdict and split verdict capital trial procedure. The briefs of the respondent in this case and of the respondent Woods in the companion case of *Witherspoon* v. *Illinois* assert that the petitioners have failed to prove that a defendant is prejudiced by the removal from his jury of persons who have conscientious scruples against the death penalty.

This insistence on the meeting of some exacting, though undefined, level of proof that the petitioner was injured in fact ignores an important body of Supreme Court doctrine. Where, as here, the fairness of the tribunal is the subject of the due process inquiry, the petitioner must show only a probability that prejudice will be occasioned by the practice in question. *Estes* v. *Texas*, 381 U.S. 532 (1965). "[O]ur system of law has always endeavored to prevent even the probability of unfairness. . . ." *In re Murchison*, 349 U.S. 133, 136 (1955). Accord, *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Chapman* v. *California*, 386 U.S. 18 (1967). The same rule is found applied with respect to the Sixth Amendment right of trial by jury, which is binding on the states, in *Parker* v. *Gladden*, 385 U.S. 363 (1966). Likewise, the result in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), depended only on the probability of prejudice when the defendant is not represented by counsel.

Turning to the equal protection inquiry, the demand that petitioner show actual prejudice is entirely without merit. The petitioner has relied upon the numerous cases holding a person accused of crime is denied equal protection when members of his race, sex, religion, economic class, or other discrete group are excluded from his jury. Never in these cases has the defendant been required to show that his trial would have been more favorable if members of a particular group had not been excluded. These cases require no more than what the petitioner has established here—a distinct class of persons, to which he has sufficient connection to be accorded standing to complain, has been excluded from the jury that tried him, and it is rational to believe that the exclusion was prejudicial to the petitioner. *Hernandez* v. *Texas*, 347 U.S. 475 (1954).[2] Standing unquestionably exists here because the petitioner desperately wished to avoid the imposition of the

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[2] The petitioner rationally could have deemed himself injured by the removal of jurors with scruples against the death penalty. It is rational for the petitioner to believe that a jury from which such persons have not been removed would be more likely to give an impartial trial. A rational belief is all that is required; this rational belief gives rise to presumption of injury. The defendant does not need to prove that what he believes is true or to prove that all other alternatives are untrue. Thus a Negro defendant is always given relief against juries from which members of his race have been systematically excluded, because of his rational belief that he is disadvantaged thereby. It is immaterial that the contrary theory can be rationally advanced, that the "peer group judges more harshly." See *United States* v. *Harpole*, 263 F. 2d 71 (5th Cir. 1959); *State* v. *Brown*, 271 N.C. 250, 156 S.E. 2d 272 (1967) (Pless, J., concurring at p. 264, "I can say that he is most fortunate that he was not tried upon a first degree murder charge before an all-Negro jury. It would have promptly returned a verdict that invoked the death penalty. One of the major complaints of the responsible Negroes is that the courts do not impose sufficient penalties when one Negro kills another)."

death penalty and therefore for the purpose of this case was a member of the class of conscientious objectors to capital punishment.[3] In *Ballard* v. *United States*, 329 U.S. 187 (1946), the Court spoke of the absence of any requirement to prove injury in the specific case where women were excluded from juries:

> The truth is that the two sexes are not fungible; a community made up exclusively of one is different from the community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.—329 U.S. 187, 194.[4]

In the case of *Crawford* v. *Bounds, supra* (major opinion p. 27) it was stipulated by counsel for the State of North Carolina that 30% of any array of veniremen truly representative of the North Carolina community would be ineligible to serve in a capital case, because they have conscientious scruples against capital punishment and because, under North Carolina practice, they would be excused from service for cause. This judicial admission by the respondent in the present case renders unnecessary any fact-finding on this point. It underscores the facetiousness of the suggestion that a court poll taker be ap-

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[3] Comment, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection*, 74 Yale L.J. 1919 (1965).

[4] One of the principal conclusions of the Court in *Crawford* v. *Bounds, supra* (major opinion pp. 27-28) was that an attack on the exclusion of jurors with conscientious scruples against the death penalty on equal protection grounds does not require any proof of actual prejudice.

pointed, made in the brief of respondent Woods filed in the *Witherspoon* case (pp. 26-27). The estimate of the North Carolina Attorney General that 30% of our citizens would be disqualified to serve by reason of opposition to capital punishment is identical to the percentage of veniremen excluded from the petitioner's jury on this ground.

III. Various avenues are open to the states to compensate for the threats of excessive acquittals and hung juries.

The suggestion in the N.A.A.C.P. Legal Defense and Education Fund amicus brief of the necessity of a factual inquiry into the relative practicability of single verdict and split verdict capital trial procedure is at cross purposes with the essence of our federal system. It is not the role of the federal courts to tell the states how to conduct their internal affairs; the federal courts in this context are concerned only with testing existing state laws and practices against the federal constitution in actual cases and controversies. *Spencer* v. *Texas,* 385 U.S. 554, 564 (1967). The split verdict capital trial procedure is only one of several avenues which could be pursued by the states in response to the supposed threats of excessive acquittals and hung juries, were the Court to grant the relief for which the petitioner prays. The choice among these avenues is a matter properly left to the states; "novel social and economic experiments" by the states generally, and particularly in matters of jury procedure, are to be encouraged. *Fay* v. *New York,* 332 U.S. 261, 296 (1947). Some of the means of controlling the problem of hung juries or excessive acquittals, or both, would be: (1) Refraining from making any compensatory change in the system, with the expectation that the absence of a chal-

lenge for cause of jurors opposed to capital punishment will have as little effect on the number of convictions and death verdicts as apparently was the case in Iowa (Petitioner's brief pp. 40-41); (2) transfer of the sentencing function from juries to judges, to restore the former practice and to conform to existing procedures in noncapital cases;[5] (3) use of a version of bifurcated trial, wherein a second jury determines the sentence once the defendant is found guilty of a capital offense;[6] (4) adjustment of the number of peremptory challenges available to the state to give the prosecuting attorney sufficient means for removing the most intransigent members of the class of nonbelievers in capital punishment; (5) providing for life imprisonment unless there is a unanimous vote (or alternatively, a vote by a stated majority) for death on the penalty issue.[7]

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[5] In Maryland the jury does not participate in the sentencing process in the trial of some crimes punishable by death. Md. Ann. Code, arts. 24-461, 27-338.

[6] The bifurcated trial might even increase the incidence of death verdicts. According to the brief of the respondent Woods in the *Witherspoon* case (p. 40) the use of the single jury bifurcated trial in California "has resulted in a far more frequent infliction of the death penalty than occurred under the older procedures."

[7] Apparently jurors almost invariably are able to resolve their differences and come to a unanimous verdict on both the issue of guilt or innocence and the issue of life or death because this problem seldom has been litigated. The few existing cases are collected in Annot., 1 A.L.R. 3d 1461 (1965). Some of the courts require unanimity on the punishment issue if a hung jury is to be averted, but others hold that the death penalty applies unless the jury returns a unanimous recommendation of life imprisonment. New Hampshire and Washington statutes provide that punishment is life imprisonment unless the jury specifies the death penalty. A Mississippi statute provides that in the event of jury disagreement on punishment, life imprisonment applies. Florida requires the vote of a simple majority of the jurors to impose life imprisonment. *Andres* v. *United States*, 333 U.S. 740, 769-770 (1948).

IV. The petitioner does not seek the retention of jurors who could not give both the state and the defendant a fair trial.

The successful operation of several of the suggested modes of procedure outlined above depend upon the honest answer of the jurors on voir dire to the question, "Will your conscientious objection to capital punishment interfere with your ability to render a fair verdict on the issue of guilt or innocence?" The petitioner acknowledges that the state's challenge must be sustained when a juror answers this question in the affirmative. The petitioner asks only for a jury that is impartial, not for one that is weighted in his favor.[8] The defendant is no more entitled to a jury which includes persons who are so infected by their opposition to capital punishment that they cannot hear the evidence and render an impartial verdict, than is the state entitled to a jury which contains a person so determined to vote for the death penalty that he is unwilling to render a fair trial to the defendant. The correct test is stated in the opinion of *Crawford* v. *Bounds, supra*:

> If a prospective juror's conscientious objections to one of the forms of punishment which the statute allows are so severe as to render him unable to participate,

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[8] A great many of the cases which have held adversely to the position of the petitioner on the question of the legality of challenging jurors with death scruples for cause have overleapt the distinction emphasized by this question. These courts have made the unwarranted assumption that any juror with conscientious scruples against the death penalty would willfully disregard the court's admonition to give both the defendant and the state an impartial trial. E.g., "It will readily be seen that this 'balanced' jury, which the defendant envisages, is in reality a 'partisan jury'. . . ." *United States* v. *Puff*, 211 F. 2d 171, 185 (2d Cir. 1954), as quoted in the opinion of the Supreme Court of North Carolina in the present case (App. 85).

> with an open mind, in the jury's deliberations on the culpability of the accused, he is properly challengeable —and should be challenged—for cause. He has demonstrated that he is not an impartial, "indifferent" juror. On the other hand, if a prospective juror with conscientious objections can, in spite of these objections, make an impartial determination on the issue of guilt, his exclusion, if the class to which he belongs become substantial, works to deny to the defendant his right to have his case judged by a jury representative of the community without serving any recognizable, legitimate interest of the state.—(major opinion, p. 29)

The brief of the respondent in this case, the briefs for the respondents in the companion *Witherspoon* case, and the amicus brief filed by the Attorney General of California all argue that the propositions that jurors with death scruples constitute a discrete class and that the members of this class tend to be prosecution-prone are not self-evident, that their truth cannot be assumed, and further that the findings of Crosson, Goldberg, Wilson, and Zeisel on these matters must be rejected. However, nowhere in the records and briefs of these two cases is any body of opinion or evidence which tends to support the contrary to these propositions; the writers of these briefs have confined themselves to collecting quibbling inconsistencies and drawing patently erroneous conclusions from the data presented to the court by the petitioners. In the brief for the respondent Woods in the *Witherspoon* case (p. 40), the categorical statement is found that, "A juror with conscientious scruples against inflicting the death penalty could not, consistent with his scruples, sign a verdict of guilt knowing that, on the basis of that verdict, a judge or an-

other jury might send a man to his death." Similarly in the amicus brief of the California Attorney General (p. 19) it is said, "[U]nder such a hypothetical two-trial system, state and federal governments would be able to exclude from the guilt trial, as well as the penalty phase, those persons who cannot impose the death penalty. The reason is simple: such persons simply cannot be fair and impartial on the issue of guilt." No evidence whatever is offered in support of these assertions. They require the assumptions, first, that every juror possessed of scruples against the death penalty would testify on voir dire that these scruples would not affect his vote on the question of guilt or innocence, and second, that this testimony always would be perjurious. These are extraordinary assumptions, assumptions without the support of experience or informed opinion. The inconsistency of relying on such bold, unfounded assumptions, while rejecting the propositions of the petitioner on the charge that they are unproven, is self-evident. The petitioner suggests that some of the prospective jurors with conscientious scruples against the death penalty would testify that their consciences do not permit them to try the issue of guilt or innocence impartially, and these persons would be discharged from jury service. Perhaps a few would prejudice themselves when they say they will give the state a fair trial on the question of guilt or innocence; and likely such persons could be spotted by a sharp-eyed prosecutor and peremptorily challenged. The remaining jurors with scruples against the death penalty, who testify that they could give both the state and the defendant an impartial trial on the primary issue of guilt or innocence would take their places in the jury box along with their fellow citizens who are unopposed to capital punishment. In the deliberations of this

jury, "the subtle interplay of influence one on the other is among the imponderables . . . ."[9] Only experience will determine whether juries so constituted will conspicuously refuse to convict as they did in 19th Century England, or as is more realistic in our legal system, consistently convict of lesser included non-capital offenses, or whether the statistics of convictions and death verdicts will be largely unaffected, as apparently was the situation in Iowa. In any event, even an acceptance of the gloomy predictions of the respondents and their amicus curiae does not convey the constitutional power to subordinate the defendant's right to a jury composed of a cross-section of the community and to a jury that is fair and impartial on the question of guilt or innocence to the desire of the state to inflict the death penalty on some of its citizens.

V. Statutory jury qualifications and exemptions do not eliminate the cross-sectional jury.

The briefs of the respondents in the *Witherspoon* case and the amicus curiae brief of the California Attorney General identify the statutory systems of jury qualification and jury exemptions and the statutory-common law systems of excuses for cause (other than for opposition to capital punishment) existing in every jurisdiction as analogous authority for support of the challenge of jurors with conscientious scruples against capital punishment. The extant qualifications for jury duty are for the most part highly objective qualitative indices, which exclude infants, insane persons, the elderly, persons manifestly unfit to serve by reason of physical or mental condition. The outer limits of these qualifications are necessarily drawn in a somewhat arbitrary manner; this is particularly the case with infants.

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[9] *Ballard* v. *United States*, 329 U.S. 187, 194 (1946).

Clearly three-year-olds and ten-year-olds, for example, cannot sit on juries; many states choose to draw the boundary at age twenty-one. It is true that in certain cases an infant on trial could rationally perceive himself to be injured by the disqualification of infants from jury duty. But this is only one aspect of the general problem of determining when and in what order to confer upon infants the manifold duties and responsibilities of citizenship. The disqualification of infants from jury duty by no means provides a logical analogy for the exclusion of the large segment of the population which opposes capital punishment. Also most of the disqualifications, almost all of the exemptions and the excuses for cause, other than for opposition to the death penalty, apply only to numerically insignificant parts of the general and local population, which are ordinarily not recognized to have any identifiable unity of characteristics.

But the network of jury qualifications, exclusions, and challenges can be implemented in such a way that criminal defendants are denied their constitutional rights.[10] This is established by the cases considering racial discrimination in jury selection. One of the earliest cases on this subject refused to uphold the findings of a state court that jury commissioners could lawfully exclude Negroes altogether

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[10] "The real issue is the relationship between the ends of impartiality and conpetency: does the system of eliminations reasonably further the end of securing a competent jury at the least possible cost of lessening the cross-section of persons who can be accepted for jury duty? . . . For example, a state law requiring jurors to have Ph.D. degrees to judge murder cases might secure competent jurors, but it would eliminate too many other potential jurors who would also be competent, thus sacrificing the advantages of a larger cross-section." Comment, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection,* 74 Yale L.J. 919, n. 29 at 924 (1965).

from the juries of the state because they were lacking in the statutory qualifications of intelligence, experience, or moral integrity. *Neal* v. *Delaware*, 103 U.S. 370 (1881). See also *Hill* v. *Texas*, 316 U.S. 400 (1942).[11]

In short, discrimination "ingenious or ingenuous," *Smith* v. *Texas*, 311 U.S. 128, 132 (1940), is prohibited by the federal constitution, and the states are on notice that when a system of benign jury qualifications, exemptions, and challenges becomes malignant, it will be overturned.

The genius of the American system of government is dependent on citizen participation in government in the roles of elector and juror. Adjudication by the federal courts and legislation by Congress implementing the Fourteenth and Fifteenth Amendments on the subject of state voting restrictions and qualifications is instructively analo-

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[11] This is one area of constitutional criminal procedure where, happily, in North Carolina the legislature has acted before the judiciary. Until 1967, according to N.C.G.S. §9-1, jury lists were taken from the tax lists and any other reliable sources, and eligibility for jury duty required residency, majority, good moral character, sufficient intelligence, and lack of conviction of crime involving moral turpitude or adjudication of mental incompetency. The prior law, as set out in N.C.G.S. §9-19, also exempted a great many types of people from jury duty, including notably most married women, members of the professions, and such divers groups as embalmers, millers of grist mills, and printers. The concern of the officers of the state that the narrow base for selection of jurors might be violative of the Equal Protection Clause is reflected in an Opinion of the Attorney General of North Carolina, dated June 3, 1966. The 1967 Legislature changed all of this, so that the law now declares that jury duty is "the solemn obligation of all qualified citizens," and that excuses are to be granted only for reasons of compelling personal hardship or contravention of the public good. N.C.G.S. §9-6, as amended 1967. Jurors are now drawn from tax lists, voter registration records, and other reliable sources; jurors must be residents of the county and citizens of the state, must have reached majority, must be mentally and physically competent, and must not have been convicted of a felony or adjudged mentally incompetent. N.C.G.S. §9-2, 3, as amended 1967.

gous to the problem of state imposed jury service qualifications and exemptions. First, blatantly invidious restrictions, such as the "grandfather clauses," were struck down. E.g., *Guinn* v. *United States,* 238 U.S. 347 (1915). More recently, however, qualifications which had legitimate purposes but were restrictive of the complete freedom of franchise have been expunged: literacy tests, educational achievement, proof of moral character, and the poll tax by the Voting Rights Act of 1965, 42 U.S.C.A. 1973, et seq.

Respectfully submitted,

NORMAN B. SMITH
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

No. 1016.—October Term, 1967.

Wayne Darnell Bumper, Petitioner, v. State of North Carolina. } On Writ of Certiorari to the Supreme Court of North Carolina.

[June 3, 1968.]

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner was brought to trial in a North Carolina court upon a charge of rape, an offense punishable in that State by death unless the jury recommends life imprisonment.[1] Among the items of evidence introduced by the prosecution at the trial was a .22-caliber rifle allegedly used in the commission of the crime. The jury found the petitioner guilty, but recommended a sentence of life imprisonment.[2] The trial court imposed that sentence, and the Supreme Court of North Carolina affirmed the judgment.[3] We granted certiorari[4] to consider two separate constitutional claims pressed unsuccessfully by the petitioner throughout the litigation in the North Carolina courts. First, the petitioner argues that his

[1] "Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." N. C. G. S. § 14-21 (1953).

[2] The petitioner was also convicted upon two charges of felonious assault and sentenced to consecutive 10-year prison terms.

[3] 270 N. C. 521, 155 S. E. 2d 173.

[4] 389 U. S. 1034.

constitutional right to an impartial jury was violated in this capital case when the prosecution was permitted to challenge for cause all prospective jurors who stated that they were opposed to capital punishment or had conscientious scruples against imposing the death penalty. Secondly, the petitioner contends that the .22-caliber rifle introduced in evidence against him was obtained by the State in a search and seizure violative of the Fourth and Fourteenth Amendments.

I.

In *Witherspoon* v. *Illinois*, decided today, we have held that a death sentence cannot constitutionally be executed if imposed by a jury from which have been removed for cause those who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty. Our decision in *Witherspoon* does not govern the present case, because here the jury recommended a sentence of life imprisonment. The petitioner argues, however, that a jury qualified under such standards must necessarily be biased as well with respect to a defendant's guilt, and that his conviction must accordingly be reversed because of the denial of his right under the Sixth and Fourteenth Amendments to trial by an impartial jury. *Duncan* v. *Louisiana*, — U. S. —; *Turner* v. *Louisiana*, 379 U. S. 466, 471–473; *Irvin* v. *Dowd*, 366 U. S. 717, 722–723. We cannot accept that contention in the present case. The petitioner adduced no evidence to support the claim that a jury selected as this one was is necessarily "prosecution prone," [5] and the materials referred to in his brief

[5] He did submit affidavits to the North Carolina Supreme Court referring to studies by W. C. Wilson and F. J. Goldberg; see *Witherspoon* v. *Illinois*, *ante*, at —, n. 10. The court made no findings with respect to those studies and did not mention them in its opinion.

are no more substantial than those brought to our attention in *Witherspoon*.[6] Accordingly, we decline to reverse the judgment of conviction upon this basis.

II.

The petitioner lived with his grandmother, Mrs. Hattie Leath, a 66-year-old Negro widow, in a house located in a rural area at the end of an isolated mile-long dirt road. Two days after the alleged offense but prior to the petitioner's arrest, four white law enforcement officers—the County Sheriff, two of his deputies, and a State investigator—went to this house and found Mrs. Leath there with some young children. She met the officers at the front door. One of them announced, "I have a search warrant to search your house." Mrs. Leath responded, "Go ahead," and opened the door. In the kitchen the officers found the rifle that was later introduced in evidence at the petitioner's trial after a motion to suppress had been denied.

At the hearing on this motion, the prosecutor informed the court that he did not rely upon a warrant to justify the search, but upon the consent of Mrs. Leath.[7] She testified at the hearing, stating, among other things:

"Four of them came. I was busy about my work, and they walked into the house and one of them

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[6] In addition to the materials mentioned in *Witherspoon, ante*, at —, n. 10, the petitioner's brief in this Court cites an unpublished dissertation by R. Crosson, An Investigation Into Certain Personality Variables Among Capital Trial Jurors (Western Reserve University, January 1966), involving a sample of 72 jurors in Ohio.

[7] "THE COURT: There is a motion here that says the property seized against the will of Mrs. Hattie Leath and without a search warrant. Now, the question is, are we going into the search warrant?

"MR. COOPER: The State is not relying on the search warrant.

"THE COURT: Are you stating so for the record?

"MR. COOPER: Yes, sir."

walked up and said, 'I have a search warrant to search your house,' and I walked out and told them to come on in. . . . He just come on in and said he had a warrant to search the house, and he didn't read it to me or nothing. So, I just told him to come on in and go ahead and search, and I went on about my work. I wasn't concerned what he was about. I was just satisfied. He just told me he had a search warrant, but he didn't read it to me. He did tell me he had a search warrant.

"He said he was the law and had a search warrant to search the house, why I thought he could go ahead. I believed he had a search warrant. I took him at his word. . . . I just seen them out there in the yard. They got through the door when I opened it. At that time, I did not know my grandson had been charged with crime. Nobody told me anything. They didn't tell me anything, just picked it up like that. They didn't tell me nothing about my grandson." [8]

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[8] She also testified, at another point:

"I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody threatened me with anything. Nobody told me they were going to hurt me if I didn't let them search my house. Nobody told me they would give me money if I would let them search. I let them search, and it was all my own free will. Nobody forced me at all.

. . . . . .

"I just give them a free will to look because I felt like the boy wasn't guilty."

The transcript of the suppression hearing comes to us from North Carolina in the form of a narrative; *i. e.*, the actual questions and answers have been rewritten in the form of continuous first person testimony. The effect is to put into the mouth of the witness some of the words of the attorneys. In the case of an obviously compliant witness like Mrs. Leath, the result is a narrative that has the tone of decisiveness but is shot through with contradictions.

Upon the basis of Mrs. Leath's testimony, the trial court found that she had given her consent to the search, and denied the motion to suppress.[9] The Supreme Court of North Carolina approved the admission of the evidence on the same basis.[10]

The issue thus presented is whether a search can be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant.[11] We hold that there can be no consent under such circumstances.

When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and volun-

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[9] "The Court finds that from the evidence of Mrs. Hattie Leath that it is of a clear and convincing nature that she, the said Mrs. Hattie Leath, voluntarily consented to the search of her premises, as is more particularly set forth in her evidence, and that that consent was specifically given and is not the result of coercion from the officers."

[10] That court also stated: "The fact that [the search] did reveal the presence of the guilty weapon . . . justifies the search. . . . [The petitioner's] rights have not been violated. Rather, his wrongs have been detected." 270 N. C., at 530–531; 155 S. E. 2d, at 180.

Any idea that a search can be justified by what it turns up was long ago rejected in our constitutional jurisprudence. "A search prosecuted in violation of the Constitution is not made lawful by what it brings to light . . . ." *Byars* v. *United States*, 273 U. S. 28, 29. See also *United States* v. *Di Re*, 332 U. S. 581, 595; *Henry* v. *United States*, 361 U. S. 98, 103.

[11] Mrs. Leath owned both the house and the rifle. The petitioner concedes that her voluntary consent to the search would have been binding upon him. Conversely, there can be no question of the petitioner's standing to challenge the lawfulness of the search. He was the "one against whom the search was directed," *Jones* v. *United States*, 362 U. S. 257, 261, and the house searched was his home. The rifle was used by all members of the household and was found in the common part of the house.

tarily given.[12] This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.[13] A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid.[14] The result

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[12] *Wren* v. *United States*, 352 F. 2d 617; *Simmons* v. *Bomar*, 349 F. 2d 365; *Judd* v. *United States*, 190 F. 2d 649; *Kovach* v. *United States*, 53 F. 2d 639.

[13] See, *e. g.*, *Amos* v. *United States*, 255 U. S. 313, 317; *Johnson* v. *United States*, 333 U. S. 10, 13; *Higgins* v. *United States*, 209 F. 2d 819; *United States* v. *Marra*, 40 F. 2d 271; *MacKenzie* v. *Robbins*, 248 F. Supp. 496.

[14] "Orderly submission to law-enforcement officers who, in effect, represented to the defendant that they had the authority to enter and search the house, against his will if necessary, was not such consent as constituted an understanding, intentional and voluntary waiver by the defendant of his fundamental rights under the Fourth Amendment to the Constitution." *United States* v. *Elliot*, 210 F. Supp. 357, 360.

"One is not held to have consented to the search of his premises where it is accomplished pursuant to an apparently valid search warrant. On the contrary, the legal effect is that consent is on the basis of such a warrant and his permission is construed as an intention to abide by the law and not resist the search under the warrant, rather than an invitation to search." *Bull* v. *Armstrong*, 48 So. 2d 467, 470 (S. C. Ala).

"One who, upon the command of an officer authorized to enter and search and seize by search warrant, opens the door to the officer and acquiesces in obedience to such a request, no matter by what language used in such acquiescence, is but showing a regard for the supremacy of the law. . . . The presentation of a search warrant to those in charge at the place to be searched by one authorized to serve it, is tinged with coercion, and submission thereto cannot be considered an invitation that would waive the constitutional right against unreasonable searches and seizures, but rather is to be considered a submission of the law." *Meno* v. *State*, 164 N. E. 93, 96 (S. C. Ind.).

See also *Salata* v. *United States*, 286 F. 125; *Brown* v. *State*, 167 So. 2d 281 (C. A. Ala.); *Mattingly* v. *Commonwealth*, 250 S. W. 105 (C. A. Ky.). Cf. *Gibson* v. *United States*, 149 F. 2d 381; *Naples* v. *Maxwell*, 271 F. Supp. 850; *Atwood* v. *State*, 280 P. 319 (Crim. C. A. Okla.); *State* v. *Watson*, 98 So. 241 (S. C. Miss.).

can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.[15]

When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.

We hold that Mrs. Leath did not consent to the search, and that it was constitutional error to admit the rifle in evidence against the petitioner. *Mapp* v. *Ohio,* 367 U. S. 643. Because the rifle was plainly damaging evidence against the petitioner with respect to all three of the charges against him, its admission at the trial was not harmless error. *Chapman* v. *California,* 386 U. S. 18.[16]

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[15] During the course of the argument in this case we were advised that the searching officers did, in fact, have a warrant. But no warrant was ever returned, and there is no way of knowing the conditions under which it was issued, or determining whether it was based upon probable cause.

[16] It is suggested in dissent that "[e]ven assuming . . . that there was no consent to search and that the rifle . . . should not have been admitted into evidence, . . . the conviction should stand." This suggestion seems to rest on the "horrible" facts of the case, and the assumption that the petitioner was guilty. But it is not the function of this Court to determine innocence or guilt, much less to apply our own subjective notions of justice. Our duty is to uphold the Constitution of the United States.

In view of the discursive factual recital contained in the dissenting opinion, however, an additional word may be in order. There can be no doubt that the crimes were grave and shocking. There *can* be doubt that the petitioner was their perpetrator. The crimes were committed at night. When, at first, the victims separately viewed a lineup that included the petitioner, each of the victims identified the same man as their assailant. That man was *not* the petitioner. Later, the victims together viewed another lineup, and every man

The judgment of the Supreme Court of North Carolina is, accordingly, reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS joins Part II of the opinion of the Court. Since, however, the record shows that 16 of 53 prospective jurors were excused for cause because of their opposition to capital punishment, he would also reverse on the ground that petitioner was denied the right to trial on the issue of guilt by a jury representing a fair cross-section of the community. *Witherspoon* v. *Illinois*, *ante*, at — (concurring opinion). Under North Carolina law, rape is punishable by death unless the jury recommends life imprisonment. N. C. Gen. Stat. § 14–21 (1953). But an indictment for rape includes the lesser offense of an assault with intent to commit rape, and the court has the duty to submit to the jury the lesser degrees of the offense of rape which are supported by the evidence. *State* v. *Green*, 246 N. C. 717, 100 S. E. 2d 52 (1957). See N. C. Gen. Stat. §§ 15–169, 15–170 (1953). These include assault with intent to commit rape, for which the range of punishment is one to 15 years' imprisonment (N. C. Gen. Stat. § 14–22), and assault (N. C. Gen. Stat. § 14–33). In the instant case, the trial judge did in fact charge the jury with respect to these lesser offenses.

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in the lineup was made to speak *his name* for "voice identification." This time the victims identified the petitioner as their assailant. At the time of the lineups a local newspaper had reported that a man named Wayne Bumper was being held by the sheriff as the "prime suspect" in the case, and at least one of the victims knew of that fact. Earlier both victims had been shown a collection of photographs. One victim identified a picture of the petitioner; the petitioner's name was written on the back of the photograph.

SUPREME COURT OF THE UNITED STATES

No. 1016.—October Term, 1967.

Wayne Darnell Bumper, Petitioner, *v.* State of North Carolina.	On Writ of Certiorari to the Supreme Court of North Carolina.

[June 3, 1968.]

Mr. Justice Harlan, concurring.

While I join in the judgment of the Court and in Part II of its opinion, I am prompted to add a brief note.

I share, as I am sure every member of the majority does, Mr. Justice Black's abhorrence of the brutal crime of which petitioner stands convicted. To avoid any misapprehension, I wish to make it perfectly clear that reversal of this conviction is not a "penalty" imposed on the State for infringement of federal constitutional rights. Reversal by this Court results, as always, only from a decision that petitioner was not constitutionally proved guilty and hence there is no legally valid basis for imposition of a penalty upon him.

In determining whether a criminal defendant was convicted "according to law," the test is not and cannot be simply whether this Court finds credible the evidence against him. Crediting or discrediting evidence is the function of the trier of fact, in this case a jury. The jury's verdict is a lawful verdict, however, only if it is based upon evidence constitutionally admissible. When it is not, as it is not here, reversal rests on the oldest and most fundamental principle of our criminal jurisprudence—that a defendant is entitled to put the prosecution to its lawful proof.

The evidence against petitioner consisted in part of a gun that he alleged was unlawfully taken from the home

of Mrs. Leath, where petitioner was living. The State contended that Mrs. Leath had consented to the search of her home. However, this "consent" was obtained immediately after a sheriff told Mrs. Leath that he had a search warrant, that is, that he had a lawful right to enter her home with or without consent. Nothing Mrs. Leath said in response to that announcement can be taken to mean that she considered the officers welcome in her home with or without a warrant. What she would have done if the sheriff had not said he had a warrant is, on this record, a hypothetical question about an imaginary situation that Mrs. Leath never faced.

Of course, if the officers had a valid search warrant, no consent was required to make the search lawful. There was a search warrant in this case, and it remains possible that this warrant was issued under circumstances meeting all the requirements of the Federal Constitution. Consequently, if this were a situation where a state court had simply chosen the wrong line of constitutional analysis of this search, I would vote to remand the case to give the prosecution an opportunity to justify the search on proper grounds. However, as noted by the Court, the prosecution here explicitly and repeatedly renounced any reliance on the warrant. Like all other parties to lawsuits, a prosecutor has an obligation to the courts (including this Court) and to other parties to present its claims at the earliest appropriate time, and to create an adequate record. Cf. *Ciucci* v. *Illinois*, 356 U. S. 571, 573 (separate note of Mr. Justice Frankfurter and MR. JUSTICE HARLAN).

Finally, if I were persuaded that the admission of the gun was "harmless error," I would vote to affirm, and if I were persuaded that it was arguably harmless error, I would vote to remand the case for state consideration of the point. But the question cannot be whether, in the view of this Court, the defendant actually committed

the crimes charged, so that the error was "harmless" in the sense that petitioner got what he deserved. The question is whether the error was such that it cannot be said that petitioner's guilt was adjudicated on the basis of constitutionally admissible evidence, which means, in this case, whether the properly admissible evidence was such that the improper admission of the gun could not have affected the result.

I do not think this can be said here. The critical question was the identity of the perpetrator of these crimes. The State introduced eyewitness identification of petitioner by his two victims, and a gun with which there was evidence these victims were shot, together with testimony that it had been found in petitioner's place of abode. The jury could, of course, have found the testimony of the victims credible beyond a reasonable doubt, and convicted petitioner on this basis alone. But it might well not have. The addition of a tangible cross-check linking petitioner with the crime can hardly be said, from the judicial vantage point, to have been harmless surplusage.

SUPREME COURT OF THE UNITED STATES

No. 1016.—October Term, 1967.

Wayne Darnell Bumper, Petitioner, v. State of North Carolina. | On Writ of Certiorari to the Supreme Court of North Carolina.

[June 3, 1968.]

Mr. Justice Black, dissenting.

I.

This case, like *Witherspoon* v. *Illinois*, — U. S. —, decided today, was brought to this Court primarily to decide the question whether the constitutional rights of a criminal defendant are violated when prospective jurors who state they are opposed to capital punishment or who have conscientious scruples against imposing the death penalty are excluded for cause. As the Court in *Witherspoon* limited its holding to the question of punishment and not of guilt,[1] the jury issue became moot in this case since petitioner had been sentenced to life imprisonment. Ironically, however, this case now becomes about as good an example as can be found of the fallacious assumption of the holding in *Witherspoon*. For the *Witherspoon* decision rests on the premise that a jury "[c]ulled of all who harbor doubts about the wisdom of capital punishment" is somehow prosecution-prone, callous or even lacking in "charity."[2] Yet the jury in this case, from which had been excluded all persons who stated they were opposed to the death penalty, unanimously recommended life imprisonment in a case where, but for their recommendation, the death sentence would

[1] See n. 21 of the *Witherspoon* opinion.

[2] See n. 17 of the *Witherspoon* opinion.

have been automatic.[3] And this is a case where the evidence conclusively showed that the accused twice raped a young woman at gunpoint, shot both the woman and her companion while they were tied helplessly to trees with the announced intention of killing them, and left them for dead. Even with these horrible facts before it, this so-called "prosecution-prone," "callous," and "uncharitable" jury refused to allow imposition of the death penalty and recommended life imprisonment instead. In these circumstances, where the real reason for granting certiorari in the case has disappeared, it seems to me that the Court should dismiss the petition as improvidently granted. This is especially true here, where, as I point out at the end of this opinion, there is an open-and-shut case of guilt, and the petitioner received the lightest sentence available under state law.

II.

Passing over the jury issue, the Court still reverses the conviction in this case and sends it back for a new trial on the ground that the rifle, which the record shows was used to shoot the victims, and which is held by the majority to have been obtained through an unconstitutional search and seizure, was admitted into evidence at petitioner's trial. One of the reasons that I cannot agree with the Court's reversal is because I believe the searching officers had valid permission to conduct their search. The facts surrounding the search are these: Petitioner had been raised by his grandmother, Mrs. Hattie Leath, with whom he was living at the time the rape and assaults were committed. Shortly after the victims were able to recount to the police what had happened to them, the county sheriff, with two of his deputies and a state police officer, went to Mrs. Leath's

[3] See N. C. G. S. § 14-21. The Court imposed additional sentences of 10 years' imprisonment, to run consecutively, on the two felonious assault charges.

house. One of the deputies went up on the porch of the house and stated to Mrs. Leath, who was standing inside the screen door, that he had a warrant to search her house. He did not appear to have any paper in his hand, and he did not read anything to her. Mrs. Leath's *immediate* response, without mentioning anything about a warrant or asking to see it or read it or have it read to her, was to tell the deputy "to come on in." At the trial Mrs. Leath described her reaction to the visit of the law officers as follows:

> "He did tell me he had a search warrant. I don't know if Sheriff Stockard was with him. I was not paying much attention. I told Mr. Stockard [after he had come up on the porch] to go ahead and look all over the house. I had no objection to them making a search of my house. I was willing to let them look in any room or drawer in my house they wanted to. Nobody told me they were going to hurt me if I didn't let them search my house. Nobody told me they would give me any money if I would let them search. I let them search and *it was all my own free will.* Nobody forced me at all." (Emphasis added.)

My study of the record in this case convinces me that Mrs. Leath voluntarily consented to this search,[4] and in fact that she actually wanted the officers to search her house—to prove to them that she had nothing to hide. Mrs. Leath's readiness to permit the search was the action of a person so conscious of her innocence, so proud of her own home,[5] that she was not going to require

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[4] Mrs. Leath's voluntary consent was sufficient to validate the search since she owned the house which was searched and the rifle that was taken. It should also be noted that the rifle was not found in petitioner's private room, nor in any part of the house assigned to him, but in the kitchen behind the door.

[5] Mrs. Leath owned the house in which she was living and throughout her questioning repeatedly referred to "my house."

a search warrant, thus indicating a doubt about the rectitude of her household. There are such people in this world of ours,[6] and the evidence in this case causes me to believe Mrs. Leath is one of them. As she herself testified, "I just give them a free will to look because I felt like the boy wasn't guilty."

Despite the statements of Mrs. Leath cited above, and despite the clear finding of consent by the trial judge, who personally saw and heard Mrs. Leath testify,[7] this Court, refusing to accept Mrs. Leath's sworn testimony that she did freely consent and overruling the trial judge's findings, concludes on its own that she did not consent. I do not believe the Court should substitute what it believes Mrs. Leath should have said for what she actually said—"it was all my own free will." I cannot accept what I believe to be an unwarranted conclusion by the Court.

III.

Even assuming for the purposes of argument that there was no consent to search and that the rifle which was

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[6] See *Commonwealth* v. *Tucker*, 189 Mass. 457, 468–469. In this case a mother consented for officers who were looking for broken pieces of a knife used in a murder to search her home. The Court found that officers went "to the door of the house where Tucker resided, and stated to his mother at the outside door of the house that they had this search warrant to search for the articles named therein . . . that she invited the officers to make all the search they desired, that she knew her sons to be innocent and therefore the officers made the search, not upon the warrant but in consequence of her invitation . . . ." The knife blade was admitted against the contention that it was barred by the Fourth and Fourteenth Amendments.

[7] The finding of the Court was as follows: "The Court finds that from the evidence of Mrs. Hattie Leath that it is of a clear and convincing nature that she, the said Mrs. Hattie Leath, voluntarily consented to the search of her premises, as is more particularly set forth in her evidence, and that that consent was specifically given and is not the result of coercion from the officers."

seized from Mrs. Leath's house should not have been admitted into evidence, I still believe the conviction should stand. For the overwhelming evidence in this case, even when the rifle and related testimony are excluded, amply demonstrates petitioner's guilt. Unfortunately, to show this, it is necessary to go into the sordid facts of the case. The victims were a young man and his girl friend. At trial both testified in detail to the following: They were parked shortly after dusk on a country road not far from where the petitioner Bumper lived. Bumper approached the car, stuck a rifle barrel up to the window and ordered the girl to get out of the car, indicating that if she refused he would shoot her. Both got out of the car and Bumper ordered the girl to undress, stating that "I want a white girl's p——." When the girl adamantly refused, Bumper pointed the rifle at the young man, and the girl, understanding that she must submit or her boy friend would be killed, followed Bumper's orders. Bumper then forced the young man into the rear seat of the car, requiring him to stay down on the floor, while Bumper raped the girl on the back of the car. A short time after this, Bumper forced the couple to drive to another spot. Here he made them get out of the car and walk down a dirt road into some bushes. At this time Bumper told the couple he was going to kill them, and when they pleaded with him to let them go, he replied, "I can't do it; you will go to the cops." The couple then suggested that if Bumper would tie them up and blindfold them that he could get away with no problem. This Bumper did, tying each to a separate tree. But he did not leave. Instead he raped the girl again while she was tied to the tree. After this, Bumper went over to the young man and felt his chest, asking him where his heart was and if he was scared. He then cooly proceeded to shoot the young man where he thought his heart was. The girl, tied to the tree and blindfolded, heard the shot, and a moment later herself

was shot through the left breast close to her heart. Bumper then took the car and drove away, obviously believing he had killed the young couple. They were able to free themselves, however, and with much difficulty made their way to a nearby house where the owner got them to a hospital.[8] The time during which the couple was held captive was approximately an hour and a half. During that time they clearly got to know who their assailant was. Both got a plain view of Bumper right at the beginning of their ordeal when they opened the car doors and saw his face in the light coming from the inside of the car. Moreover, the undisputed evidence in the record shows that the night of the attack was a bright moonlit night. Both testified positively at trial that it was Bumper.[9] Also there was substantial corroborating evidence outside of that relating to the rifle. Here we have the clear and convincing testimony of the two victims, whose characters were in no way impeached or challenged. The only witnesses at the trial were state

[8] It was on these facts and this testimony, it must be remembered, that this jury, selected in the way *Witherspoon* holds is designed to produce a "hanging" jury, recommended a life sentence for petitioner.

[9] The Court's opinion attempts to convey the impression that the victims were not sure of their assailant's identification because of an alleged mistake during a police lineup. See majority opinion, n. 16. This completely overlooks the fact, however, that before Bumper was arrested, and before the victims had any idea of their attacker's name or where he was from, the girl, while still in the hospital, identified Bumper's picture from a number of others. The young man also had identified Bumper's picture days before the lineup was held. After the girl went through the lineup the first time she confessed that she was too scared to look at the men and that she had made no real attempt at identification. And it should not be forgotten that she testified positively under oath at trial that "In my own mind I am certain [that Bumper was her assailant], and nothing could really dissuade me from it. I haven't made up my mind; I know."

witnesses (the two victims plus medical and police testimony), and none of their testimony was refuted or denied in any way. Thus, this is a case where every word of evidence introduced at trial pointed to guilt, and there was no challenge to the truthfulness of the State's evidence, nor to the character of any of its witnesses. Yet even with all this, the Court persists in reversing the case, thus requiring the State to hold a new trial if it wishes to punish Bumper for his crimes.

When it is clear beyond all shadow of a doubt, as here, that a defendant committed the crimes charged, I do not believe that this Court should enforce on the States a "per se" rule automatically requiring a new trial in every case where this Court concludes that some part of the evidence was obtained by an unreasonable search and seizure. The primary reason the "exclusionary rule" was adopted by this Court was to deter unreasonable searches and seizures in violation of the Fourth Amendment. *Mapp* v. *Ohio,* 367 U. S. 643. But see my concurring opinion at pp. 661–666. I believe that the deterrence desired by some can be served adequately without blind adherence to a mechanical formula that requires automatic reversal in every case where the exclusionary rule is violated. While little is known about the effect the exclusionary rule really has on actual police practices, I think it is a fair assumption that refusal to reverse a conviction of a defendant, because of the admission of illegally seized evidence, where other evidence conclusively demonstrates his guilt, is not going to lessen police sensitivity to the exclusionary rule, thereby reducing its deterrent effect. Obviously at the time a search is carried out the police are not going to know whether the evidence they hope to obtain is going to be necessary for the prosecution's case, and, of course, if they know it will not be necessary, no search is needed. Thus the only effect

of not automatically reversing all cases in which there has been a violation of the exclusionary rule will be to allow state convictions of obviously guilty defendants to stand. And they should stand.

IV.

In this case, as I have shown, the evidence of the two victims points positively to guilt without any doubt. When there is added to this the fact that the rifle, from which came the bullets which went into the bodies of the two victims, was found where Bumper lived, which was not far from the scene of the assault, this makes, as the North Carolina Supreme Court pointed out, assurance doubly sure. Whether one views the evidence of guilt with or without the rifle, the conclusion is inescapable that this defendant committed the crimes for which the jury convicted him. In these circumstances no State should be forced to give a new trial; justice does not require it.[10]

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[10] 28 U. S. C. § 2106 provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had *as may be just under the circumstances.*" (Emphasis added.)

SUPREME COURT OF THE UNITED STATES

No. 1016.—October Term, 1967.

Wayne Darnell Bumper, Petitioner, v. State of North Carolina.	On Writ of Certiorari to the Supreme Court of North Carolina.

[June 3, 1968.]

Mr. Justice White, dissenting.

When "consent" to a search is given after the occupant has been told by police officers that they have a warrant for the search, it seems reasonable to me for Fourth Amendment purposes to view the consent as conditioned on there being a valid warrant, absent clear proof that the consent was actually unconditional. The evidence in this record does not show unconditional consent with sufficient clarity, and perhaps this would be the result in most cases. But this does not mean that every search following conditional consent is invalid. If upon a motion to suppress or upon an objection to evidence offered at the trial, the State produces a valid warrant for the search, there is no good reason to exclude the evidence simply because police at the time of the search relied on the consent and neither served nor returned the warrant. In the case before us the State represented in this Court that there was a warrant for the challenged search. Unlike the Court and Mr. Justice Harlan, I would not brush this matter aside. Since the existence and validity of the warrant have not been determined in the state courts, the case is not ripe for reversal or affirmance. I would therefore not reverse, but vacate, this conviction, returning the case to the state courts for a determination of the validity of the warrant. If because of the absence of probable cause,

or for some other reason, the warrant would not have been a proper predicate for the search, *Mapp* v. *Ohio*, 367 U. S. 643 (1961), would require reversal of the conviction unless it is saved under the harmless-error rule of *Chapman* v. *California*, 386 U. S. 18 (1967).*

*Of course, if it was determined that the grandmother's consent was not good against petitioner, who had standing to raise the validity of the search, it would be unnecessary to deal with the issues which have been argued and determined in this case.